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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1918

No. [redacted] 234

CLARENCE H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, A CORPORATION, AND ANACONDA COPPER MINING COMPANY, APPELLANTS,

vs.

WILLIAM W. ALDER, CLINTON C. CLARK, LOUIS MASON, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

FILED AUGUST 31, 1918.

(24,242)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 617.

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, A CORPORATION, AND ANACONDA COPPER MINING COMPANY, APPELLANTS,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

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Messrs. Walsh & Nolan, of Helena, Montana; J. T. Fitzgerald, Esq., of Butte, Montana; Fred J. Furman, Esq., of Butte, Montana; A. J. Verheyen, Esq., of Butte, Montana; J. A. Smith, Esq., of Butte, Montana; E. H. Powers, Esq., of Jacksboro, Tenn., Solicitors for Defendants and Appellees.

2 In the District Court of the United States in and for the District of Montana.

No. 21. In Equity.

OLIVIA H. HOPKINS, Washington-Butte Mining Company, a Corporation, and Anaconda Copper Mining Company, a Corporation, Plaintiffs,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, Johanna Farlin, A. F. Bushnell, Patrick Leroux, J. T. Fitzgerald, Elizabeth Brown, C. B. Nolan, W. D. Thornton, Nancy Hobbs, Lou H. Hadwick, Annie Stalker, M. F. Cleary, E. J. Cleary, Adolph Keppler, J. B. Woods, Rachael Merriman, Bertha McGowan, and Alice McGowan, Defendants.

Be it remembered, that on December 31, 1914, plaintiffs filed their Bill of Complaint herein, and thereafter motions to dismiss the bill were filed by defendants, which said bill and motions are set forth in the Certificate of Question of Jurisdiction hereinafter contained; that on July 2, 1915, the cause was heard and submitted to the court on said Motions to Dismiss; and thereafter, on July 10, 1915, the Court filed its Opinion dismissing the Bill, said Opinion being in the words and figures following, to wit:

3 In the District Court of the United States for the District of Montana.

No. 21.

OLIVIA H. HOPKINS, Washington-Butte Mining Company, a Corporation, and Anaconda Copper Mining Company, a Corporation, Plaintiffs,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, Johanna Farlin, A. F. Bushnell, Patrick Leroux, J. T. Fitzgerald, Elizabeth Brown, C. B. Nolan, W. D. Thornton, Nancy Hobbs, Lou H. Hadwick, Annie Stalker, M. F. Cleary, E. J. Cleary, Adolph Keppler, J. B. Woods, Rachel Merriman, Bertha McGowan, and Alice McGowan, Defendants.

H. C. Hopkins, for Olivia H. Hopkins.

L. O. Evans, W. B. Rodgers, and D. Gay Stivers, for Anaconda Copper Mining Company.

J. L. Templeton and John A. Shelton, for Washington-Butte Mining Company.

Walsh & Nolan, for defendants.

Opinion.

RUDKIN, *District Judge:*

This is a suit in equity to quiet the title of the plaintiffs to certain mining property in the state of Montana against the claim of the defendants to an adverse estate or interest therein. The bill of complaint avers that the plaintiffs are the owners and in possession of the property under patent from the United States, and that the defendants claim an interest therein adversely to the plaintiffs by virtue of certain mining locations of record in Silver Bow County, Montana, where the property is situated. The case is now before the court on motion to dismiss for want of jurisdiction, and

4 a more detailed statement of the allegations of the bill is deemed unnecessary, except to state that no diversity of citizenship appears, and the court is without jurisdiction unless the matter in controversy arises under the constitution or laws of the United States. It seems to be conceded by the plaintiffs that the matter in controversy does not arise under the constitution or laws of the United States unless the court can take into consideration the nature of the adverse claim asserted by the defendants, and, for the purposes of the present motion at least, the court will concede that a federal question is presented if the nature of the adverse claim of the defendants as set forth in the bill of complaint can be taken into consideration in the determination of the jurisdictional question.

The following propositions are so firmly established by repeated

decisions of the Supreme Court as to require no citation of authorities in their support:

1. To give a Federal Court jurisdiction of a suit on the ground that it involves a federal question, there must be a real and substantial dispute as to the effect or construction of the constitution, or of some law of the United States; in other words, it must appear that some right, title, privilege or immunity, on which the right of recovery depends, will be defeated by one construction of the constitution, or a law of the United States, or sustained by the opposite construction.

2. The mere fact that a party claims title to property, immediately or remotely, through a patent from the United States presents no federal question.

3. When the original jurisdiction of a district court of the United States is invoked on the sole ground that the case arises under the constitution or laws of the United States the federal question must appear from the statement of the plaintiff's claim. Jurisdiction cannot be created by anticipating the defendant's claim or by alleging that the defendant will interpose a defense arising under the constitution or laws of the United States.

I do not understand that these general propositions are controverted by the plaintiffs, but they earnestly insist that the rule is otherwise in suits to remove a cloud; that in such cases the plaintiff must, in addition to the statement of his own claim, set forth the claim of the defendant, stating the facts which give it apparent validity as well as those which tend to show its invalidity; and that if a federal question appears from the statement of the claim of either the plaintiff or the defendant a federal court has jurisdiction.

The argument is plausible, but I am far from convinced that a federal question may be raised in this way.

Section 6870 of the Revised Codes of Montana provides that an action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim. The relief thus provided may be granted by either a state or a federal court of competent jurisdiction, and in neither court is it necessary to set forth the nature of the adverse claim.

Holland v. Challen, 110 U. S., 15.
Reynolds v. Crawfordsville Bank, 112 U. S., 405.
More v. Steinbach, 127 U. S., 70.
Goldsmith v. Gilliland, 22 Fed. 865.
California Oil & Gas Co. v. Miler, 96 Fed., 12.

Thus in Reynolds v. Crawfordsville Bank, supra, after referring to a similar statute of Indiana, the Court said:

"This act confers upon any one, against whom another, whether in or out of possession, claims an adverse title or interest in real estate, the substantial right of having the disputed title settled by action of the courts."

"Under this statute it has been decided by the Supreme Court of Indiana that it is sufficient to aver that the defendant claims some

interest or title, or pretended interest or title, adverse to the
6 claimant, without stating what the title is."

Nor is there any distinction in this regard between suits to quiet title and suits to remove a cloud. Indeed under modern statutory enactments the distinction has little more than an historical interest. Thus in Holland v. Challen, supra, Mr. Justice Fields said:

"The statute of Nebraska enlarges the class of cases in which relief was formerly afforded by a court of equity in quieting the title to real property. It authorizes the institution of legal proceedings not merely in cases where a bill of peace would lie, that is, to establish the title of the plaintiff against numerous parties insisting upon the same right, or to obtain repose against repeated litigation of an unsuccessful claim by the same parties; but also to prevent future litigation respecting the property by removing existing causes of controversy as to its title, and so embrace cases where a bill qui timet to remove a cloud upon the title would lie."

And, after referring to the distinction between the two classes of cases, the learned justice continued:

"The statute of Nebraska authorizes suit in either of these classes of cases without reference to any previous judicial determination of the validity of the plaintiff's right and without reference to his possession. Any person claiming title to real estate, whether in or out of possession, may maintain the suit against one who claims an adverse estate or interest in it for the purpose of determining such estate and quieting the title."

The precise question now before the court was decided adversely to the contention of the plaintiffs by Judge Wellborn in the well considered case of California Oil & Gas Co. v. Miller, supra. In discussing the manner in which the federal question must appear the learned judge said:

"When the pending matters were argued orally before me, I made the suggestion that in a suit to quiet title, such as the one at bar, the particular claims or contentions of defendants might possibly be parts of the complainant's case. Subsequent reflection convinces me that my suggestion was without merit, and that the complainant need do no more than allege his own title and that the defendant claims adversely to him. The nature of the adverse claim, and the source and manner from and in which it originated are immaterial. If such matters are alleged in the bill, they must be disregarded in determining the jurisdictional question not merely because of their immateriality, but for the further and obvious reason that defendants may not, in their answer, make the claims or contentions which the bill anticipates. The possibility, or even probability, that a federal question may arise during the progress of a cause will not sup-
port original jurisdiction in a Circuit Court, but the plain-
7 tiff's statement of his own claim must show that such a question is necessarily involved, and must be determined. If the defendant should fail to answer and the bill be taken pro confesso, the decree entered by the court would quiet complainant's title against all claims of the defendants. If the defendants should

answer, and set up claims other than those attributed to them by the bill, the answer certainly would be good. Should the defendants, in their answer, simply deny that they assert the claims alleged in the bill, the answer would be bad, because implying that some other adverse title was asserted. If the defendants should deny that they asserted any title prior to the commencement of the suit such denial would not present a material issue. These suppositions show that the only material allegation relating to the defendant is as above stated, that the defendant claims the property adversely to the complainant."

For the foregoing reasons I am convinced that the detailed statement of the defendants' claim contained in the present bill of complaint is wholly unnecessary, and that jurisdiction in a federal court cannot be created by a resort to mere surplusage. The plaintiffs contend that the case of Moore v. McGuire, 205 U. S., 214, is controlling here; but I fail to see its application. Certainly the question now before the court was not discussed in the opinion of the Supreme Court and so far as I can see was not involved at all. A full statement of the case will be found in the opinion of the Circuit Court reported in 142 Federal at page 787. The suit was brought in the United States Circuit Court for the Eastern District of Arkansas to quiet title to a tract of land constituting an island in the Mississippi River. The Circuit Court held that the land was in the state of Mississippi and dismissed the suit for want of jurisdiction. But whether the land was within the jurisdiction of the court or not clearly appeared from the statement of the plaintiff's claim. True, the bill set forth the claim of the defendant, but that added nothing to the statement of the plaintiff's claim in so far as the situs of the property was concerned. The Supreme Court held that the Circuit Court had jurisdiction because the construction of the Act of Con-

8 gress admitting the state of Arkansas to the Union and defining its boundaries was in dispute, but as already stated, the fact that the construction of this Act of Congress was in dispute clearly appeared from the statement of the plaintiff's claim, and without any regard to the adverse claim asserted by the defendant. I am therefore of the opinion that the court is without jurisdiction and the bill is dismissed. Let a decree be submitted accordingly.

Filed July 10, 1915.

GEO. W. SPROULE, *Clerk.*

9 Thereafter, on July 26th, 1915, a Decree was duly signed and thereafter filed and entered herein, being as follows, to wit:

10 In the District Court of the United States in and for the District of Montana.

No. 21. (In Equity.)

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, a Corporation, and Anaconda Copper Mining Company, a Corporation, Complainants,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, Johanna Farlin, A. F. Bushnell, Patrick Leroux, J. T. Fitzgerald, Elizabeth Brown, C. B. Nolan, W. D. Thornton, Nancy Hobbs, Lou H. Hadwick, Annie Stalker, M. F. Cleary, E. J. Cleary, Adolph Keppler, J. B. Woods, Racheal Merriman, Bertha McGowan, and Alice McGowan, Defendants.

Decree.

This suit coming on to be heard on motion of the defendants to dismiss on the ground that the court had no jurisdiction to try said cause, and the same having been fully heard and considered, and the said motion having been sustained, and it appearing to the court that the court has no jurisdiction of the said suit, it is therefore,

Ordered, adjudged and decreed, that the bill herein be, and the same is hereby dismissed on the ground that this court has not jurisdiction of the said cause.

FRANK H. RUDKIN,
Judge of the United States District Court for the Eastern District of Washington, Sitting as Judge of the United States District Court for the District of Montana.

Dated this 26th day of July, 1915.

Filed & Entered July 28, 1915.
GEO. W. SPROULE, *Clerk.*

11 Thereafter, on July 28, 1915, plaintiffs filed their Assignment of Errors herein, in the words and figures following, to wit:

12 In the District Court of the United States in and for the District of Montana.

No. 21. (In Equity.)

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, a Corporation, and Anaconda Copper Mining Company, a Corporation, Complainants,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, Johanna Farlin, A. F. Bushnell, Patrick Leroux, J. T. Fitzgerald, Elizabeth Brown, C. B. Nolan, W. D. Thornton, Nancy Hobbs, Lou H. Hadwick, Annie Stalker, M. F. Cleary, E. J. Cleary, Adolph Keppler, J. B. Woods, Racheal Merriman, Bertha McGowan, and Alice McGowan, Defendants.

Assignment of Errors.

Come now the complainants herein and assign errors in the decision and in the decree of the United States District Court for the District of Montana, in the above entitled cause, as follows:

First. The court erred in sustaining the motion of the defendants herein to dismiss the bill herein on the ground that the court had not jurisdiction of the said cause.

Second. The court erred in holding that it had no jurisdiction of the said cause and in dismissing the bill herein.

Third. The court erred in entering a decree of dismissal herein and in adjudging and decreeing that the said bill be dismissed.

In order that the foregoing assignment of errors may be and appear of record, complainants present the same to the court and pray that such disposition be made thereof as is in accordance with the law and statutes of the United States in such cases made and provided, and complainants pray a reversal of the decree dismissing the bill herein and of the decree of dismissal made and entered herein.

13

H. C. HOPKINS,
Solicitor for Complainant, Olivia H. Hopkins.
J. L. TEMPLEMAN,
JOHN A. SHELTON,
Solicitors for Complainant, Washington-Butte Mining Company.
L. O. EVANS,
W. B. RODGERS,
D. GAY STIVERS, AND
D. M. KELLY,
Solicitors for Complainant, Anaconda Copper Mining Company.

Filed July 28, 1915.
GEO. W. SPROULE, *Clerk.*

14 Thereafter, on July 28, 1915, Certificate of Question of Jurisdiction was duly filed herein, in the words and figures following, to wit:

15 In the District Court of the United States in and for the District of Montana.

No. 21. (In Equity.)

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, a Corporation, and Anaconda Copper Mining Company, a Corporation, Complainants,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, Johanna Farlin, A. F. Bushnell, Patrick Leroux, J. T. Fitzgerald, Elizabeth Brown, C. B. Nolan, W. D. Thornton, Nancy Hobbs, Lou H. Hadwick, Annie Stalker, M. F. Cleary, E. J. Cleary, Adolph Keppler, J. B. Woods, Racheal Merriman, Bertha McGowan, and Alice McGowan, Defendants.

Certificate of Question of Jurisdiction on Appeal from the United States District Court for the District of Montana to the Supreme Court of the United States.

Complainants having begun this suit by filing their bill herein, and the defendants Frank Walker, Clinton C. Clark, Louis Mason, L. O. Clark, Johanna Farlin, J. T. Fitzgerald, C. B. Nolan, Racheal Merriman, M. F. Cleary, E. J. Cleary, Adolph Keppler, J. B. Woods, Elizabeth Brown, Nancy Hobbs, Bertha McGowan and Alice McGowan, having filed their motions to dismiss on the ground that the court has not jurisdiction of the said cause, and the said motions having been sustained on the said ground and a decree dismissing the said bill having been made and entered herein on the ground that the court has no jurisdiction of the said cause, and the said complainants being desirous of appealing from the decree dismissing said bill, and having this day applied to the above entitled court for a certificate as required by law in such cases, the court hereby certifies to the Supreme Court of the United States for its decision, the question whether or not upon the record as certified herein the above entitled court had jurisdiction of the said cause:

The bill filed herein December 31, 1914, is in words and figures as follows, to-wit:

16 In the District Court of the United States in and for the District of Montana.

(In Equity.)

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY (a Corporation), and Anaconda Copper Mining Company (a Corporation), Complainants,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, Johanna Farlin, A. F. Bushnell, Patrick Leroux, J. T. Fitzgerald, Elizabeth Brown, C. B. Nolan, W. D. Thornton, Nancy Hobbs, Lou H. Hadwick, Annie Stalker, M. F. Cleary, E. J. Cleary, Adolph Keppler, J. B. Woods, Racheal Merriman, Bertha McGowan, and Alice McGowan, Defendants.

Bill.

To the Honorable the Judges of the District Court of the United States in and for the District of Montana:

Olivia H. Hopkins a citizen and resident of the State of Montana, Washington-Butte Mining Company, a Washington corporation and Anaconda Copper Mining Company a Montana corporation, bring this their bill against the defendants; Frank Walker, Clinton C. Clark, Louis Mason, L. O. Clark, Johanna Farlin, A. F. Bushnell, Patrick Leroux, J. T. Fitzgerald, Elizabeth Brown, C. B. Nolan, W. D. Thornton, Nancy Hobbs, Lou H. Hadwick, Annie Stalker, M. F. Cleary, E. J. Cleary, Adolph Keppler, J. B. Woods, Rachael Merriman, Bertha McGowan and Alice McGowan and thereupon your orators complain and say:

First. That the said Washington-Butte Mining Company is now and was at all times herein mentioned from and since, the 4th day of February 1910, a corporation duly organized and existing under and by virtue of the laws of the state of Washington; that said Anaconda Copper Mining Company is now and was at all times herein mentioned from and since the 18th day of June 1895,

17 a corporation duly organized and existing under and by virtue of the laws of the state of Montana; that the Complainant Olivia H. Hopkins and the Defendants Frank Walker, Clinton C. Clark, Louis Mason, L. O. Clark, Johanna Farlin, A. F. Bushnell, Patrick Leroux, J. T. Fitzgerald, Elizabeth Brown, C. B. Nolan, W. D. Thornton, Lou H. Hadwick, M. F. Cleary, E. J. Cleary, Adolph Keppler, J. B. Woods, Rachael Merriman, Bertha McGowan and Alice McGowan, are citizens and residents of the state of Montana and the defendant Nancy Hobbs is a citizen and resident of the state of Tennessee and the defendant Annie Stalker is a citizen and resident of the state of Kansas; that the defendants Bertha McGowan and Alice McGowan are infants of the ages of 11 and 9 years respectively.

Second. That complainants are now and that they and their predecessors in interest have continuously for more than 20 years

immediately preceding the commencement of this action been the owners, their title being based on undisputed evidence and holding under a patent from the Government of the United States, (copy of such patent being hereunto annexed marked Exhibit "A"), and in the actual possession of the following particularly described land situated in Silver Bow County, Montana, the same being a portion of the Butte & Boston Placer Mining Claim, Survey, No. 3379 to wit: beginning at corner Number 4 of said Butte & Boston Placer Mining Claim, Survey No. 3379, a granite stone marked 4-3379; thence north 80 degrees 50 minutes west 182 feet to Corner No. 5, a quartz stone marked 5-3379; thence south 77 degrees 12 minutes west, 906.8 feet thence north 0 degrees 12 minutes west, 600 feet; thence north 77 degrees 12 minutes east, 278 feet; thence south 63 degrees 15 minutes east, 482.5 feet more or less to Corner No. 3 of said Survey No. 3379 corner stone 20 x 8 x 6 inches, marked 3-3379 thence south 42 degrees 05 minutes east, 398 feet to place of beginning; together with all of the mines, ores and minerals therein contained.

Third. Complainants allege that the following named paper writings were on the dates set after their names respectively filed
18 for record in the office of the County Clerk and Recorder of Silver Bow County, Montana and the same were recorded and now so remain of record in the said office and in the book and page of Quartz Lode Location records set after their respective names as follows:

Name of paper writing.	Date filed for record.			Vol. and page, lode location, records where recorded.	
	Year.	Month.	Day.	Volume.	Page.
Amended Declaratory Statement, Location Hornet Lode Mining Claim	1900,	June	2nd	U.	213
Amended Declaratory Statement, Location Rabbit Lode Mining Claim	1900,	May	9th	Z.	217
Amended Declaratory Statement, Location Hope Lode Mining Claim	1900,	June	16th	Z.	213
Amended Declaratory Statement, Location Olivia Lode Mining Claim	1900,	May	24th	Z.	215
Declaratory Statement, Location Gulf Lode Mining Claim	1900,	May	24th	Q.	96
Certificate of Location Wilson Lode Mining Claim	1900,	Nov.	22nd	10	47
Certificate of Location Marshall Lode Mining Claim	1912,	Nov.	22nd	10	48
Certificate of Location Wrangle Lode Mining Claim	1913,	Jan.	14th	10	78
Certificate of Location Helen Lode Mining Claim	1913,	Jan.	14th	10	79

That each of said paper writings is by copy thereof, hereunto annexed, marked respectively, Exhibit- "B" "C" "D" "E" "F" "G" "H" "I" and "J." That the land embraced within the exterior boundaries of each of the said pretended locations is either wholly or partly part and parcel of the land hereinbefore described and alleged to be owned by the Complainants by virtue of a patent therefor as a Placer mining claim issued by the United States to Complainants' predecessors in interest; that the land herein described is embraced within the exterior boundaries of two lode locations made or attempted to be made prior to the date of the location of the said Butte & Boston placer, which lode locations were known respectively as Point Pleasant Lode claim and Pleasant View lode claim; that said last named lode claims if valid in the beginning continued in force (except for the proceedings hereinafter set forth) to and including the date of the issuance of said patent; that the said Point Pleasant and
19 Pleasant View lode claimants filed in the United States Land Office at Helena, Montana, in due time two adverse claims to the said application for patent for the said Butte & Boston Placer which said adverse claims were in due form of law and were filed during the period of publication of notice of said application for patent and in the same said Point Pleasant and Pleasant View lode claimants by reason of said Point Pleasant and Pleasant View lode claims asserted adversely to said applicants a claim of right to the possession of so much of the land embraced in said application for patent as was in conflict with said lode claims and within 30 days after the filing of said adverse claims, said adverse claimants with respect to each of said adverse claims, filed against said applicants in the second Judicial District Court of the State of Montana a complaint in due form of law to determine the right of possession as to the land embraced in said adverse claims; said applicants filed answer in each of said suits, which suits were regularly heard and determined and a decision and judgment duly given and made in each of them in favor of the defendants therein and the judgment roll in each of said suits duly certified was filed in the said United States Land Office together with the requisite description and certificate of the Surveyor General, whereupon said proceedings and judgment rolls being certified to the Commissioner of the General Land Office, and on payment of the purchase price for the land said patent was issued in conformity with said judgments; that the said defendants and each of them claim that the said patent was to the extent of the land embraced in said Point Pleasant and Pleasant View lode claims wholly invalid and that it was rendered so invalid because of the existence and continuance in force of said claims at the date of issuance of said patent and if not so invalid that the said land herein particularly described and all of the same with any and all lodes, veins and deposits of mineral therein contained was, because of the known existence by said applicants for patent at the date of said application within said described land of certain veins and lodes re-
20 served and excepted from the said patent and that the title thereto remained in the United States of America until so located or attempted to be located by the said defendants or their

predecessors in interest and said defendants further claim that the lode location of any of the said lodes and veins within the said ground and by them so claimed to be subject to location may embrace an area of surface ground having a length and breadth of 1500 feet and 600 feet respectively and all of the said pretended lode locations are so made as to embrace an area of surface ground of that extent; that none of the said claims of the defendants can be sustained; that regardless of whether said Point Pleasant and Pleasant View lode claims so existed and so continued in force said patent was not wholly or as to the land so described or as to any land embraced within its exterior boundaries invalid; that no vein or lode within the meaning of the terms as used in Section 2333 of the Revised Statutes of the United States was known at the date of said application to exist within said Butte & Boston Placer Mining Claim; that if any veins or lodes had been so reserved or excepted or if such patent as to the same was invalid a lode location of any one of them could not embrace an area of enclosing surface ground exceeding 25 feet on each side of the center of the vein or lode located, and could not embrace any portion of such vein or lode not actually uncovered and exposed to view at or prior to the date of said application for patent and on said date there had been no opening made on said ground beneath the surface of bedrock and no exposure of the surface of bedrock of a greater extent than ten feet in any one direction; that the said described land or any lode, vein or deposit of mineral or any land embraced within the exterior boundaries of the said patent (excepting only segments of veins apices of which are outside of said Butte & Boston Placer) was not reserved or excepted therefrom and said pretended lode claims are and each of them is entirely invalid and the said declaratory statements of location and certificates
21 of location so of record, are and each of them is invalid and constitute and each of them constitutes a cloud upon the title of the complainants in and to the said premises and every part thereof and reduce the market value thereof; that the said defendants have not and none of them has any right, title or interest either at law or in equity in or to the said lands or any part thereof; that the determination of the rights of the complainants herein requires a determination of the effect of said judgments, a construction of the laws of the United States under which the said proceedings were had in the said land office and by authority of which the said patent was issued, and a determination of the extent of the rights and character of the title conveyed by such patent; of what may, by the provisions of said section 2333, be reserved and excepted from it and if it should be held that any lodes or veins or any surface ground was reserved or excepted from the land which said patent purports to convey then a determination of the extent to which such lode or vein is subject to appropriation and location and the extent of the area of surface ground which may be embraced in a lode location made on any lode or vein within the exterior boundaries of the land described in the said patent.

Fourth. That the said defendant Clinton C. Clark claims a distinct and individual interest in and to the said lands and premises

by virtue of the said Helen attempted location; that he also claims a distinct and individual interest in and to the said lands and premises by virtue of the said Gulf attempted location; that the said defendant Walker claims a distinct and individual interest in and to the said lands and premises by virtue of the said Wrangle, Wilson and Marshall attempted locations; that he also claims a distinct and individual interest in and to the said lands and premises by virtue of the said Rabbit, Olivia, Hope and Hornet attempted locations; that the defendants Leroux, Merriman, Bertha McGowan and Alice McGowan claim distinct and individual interests in and to the said lands and premises by virtue of the said Gulf attempted location; that the said defendants Thornton, Woods M. F. Cleary, E. J. Cleary, Keppler and Nolan claim distinct and individual interests in and to the said lands and premises by virtue of the said Hornet, Hope, Olivia and Rabbit attempted locations; that the said defendant, L. O. Clark claims a distinct and individual interest in and to the said lands and premises by virtue of the said Rabbit, Olivia, Gulf, Hope and Hornet attempted locations; that the defendants Farlan, Brown, Fitzgerald, Stalker, Hadwick, Hobbs and Bushnell claim distinct and individual interests in and to the said lands and premises by virtue of the said Rabbit, Olivia, Gulf and Hope attempted locations and that none of said defendants claim any interest in said lands by reason of any of said attempted locations, except as herein stated; that the matter in controversy herein as to each of the said defendants exceeds, exclusive of interest and costs the sum or value of $3,000 and this suit is one arising under the laws of the United States.

22

In consideration whereof and forasmuch as the complainants have no remedy at law and are only relievable in equity and to the end that the complainants may have the relief which they can only obtain in a court of Equity and to the end that the said defendants and each of them may answer herein but not upon oath or affirmation the benefit whereof is expressly waived by the complainants who now pray the court that a decree be entered herein that the cloud caused by the recording of the said declaratory statements of location and certificates of location in the office of the County Clerk and Recorder of Silver Bow County, Montana, and each and all of them be removed, and the same decreed to be no cloud upon the title of the complainants in and to the said premises and that the title of the complainants therein be quieted and for such further and other relief in the premises as equity and good conscience may require, and for costs of suit.

23

Complainants pray for general relief.

May it please your Honors to grant unto the complainants a writ of subpœna, to be directed to the said, Frank Walker, Clinton C. Clark, Louis Mason, L. O. Clark, Johanna Farlin, A. F. Bushnell, Patrick Leroux, J. T. Fitzgerald, Elizabeth Brown, C. B. Nolan, W. D. Thornton, Nancy Hobbs, Lou H. Hadwick, Annie Stalker, M. F. Cleary, E. J. Cleary Adolph Keppler, J. B. Woods, Rachael Merriman, Bertha McGowan and Alice McGowan and each of them thereby commanding them, and each of them, at a certain time and

under a certain penalty therein to be limited personally to appear before this Honorable Court and then and there full, true, direct and perfect answer make.

H. C. HOPKINS,
Solicitor for Complainant Olivia H. Hopkins.
L. O. EVANS,
W. B. RODGERS AND
D. GAY STIVERS,
Of Butte, Montana,
Solicitors for Complainant Anaconda Copper Mining Co.
J. L. TEMPLEMAN,
JOHN A. SHELTON,
Solicitors for Complainant
Washington-Butte Mining Co.

24 EXHIBIT A.

(4-459a.)

General Land Office. No. 26344.

Mineral Certificate. No. 3170.

The United States of America to S. V. Kemper, Josephine Lorenz, to all to whom these presents shall come, Greeting:

That whereas, in pursuance of the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the plat and field notes of survey and the certificate No. 3179 of the Register of the Land Office at Helena, in the State of Montana, accompanied by other evidence, whereby it appears that Simeon V. Kemper and Josephine Lorenz did, on the fourteenth day of September, A. D. 1895, duly enter and pay for that certain placer mining claim and premises designated by the Surveyor General as Lot No. 3379, known as the "Butte and Boston" Placer Mining Claim, and embracing a portion of township 3 north of range 7 west of the principal meridian in the — mining district, in the County of Silver Bow and State of Montana, in the district of lands subject to sale at Helena, and bounded and described and platted as follows:

Beginning at corner No. 1, being the east quarter corner of section 17, in T. 3 N. of R. 7 W, of the principal meridian.

Thence, first course, east 818 feet to corner No. 2;

Thence second course, south 63 degrees 15 minutes east,
25 800 ft. to corner No. 3;

Thence, third course, south 42 degrees 05 minutes east, 398 feet to corner No. 4;

Thence, fourth course, north 80 degrees 50 minutes west, 182 feet to corner No. 5;

Thence, fifth course, south 77 degrees 12 minutes west, 1507 feet to corner No. 6;

Thence, sixth course, south 12 degrees 48 minutes east, 394 feet to corner No. 7½;

Thence, seventh course, north 87 degrees west, 232.5 feet to corner No. 8;

Thence, eight- course, north 0 degrees 12 minutes west, 1332 ft. to corner No. 1, the place of beginning.

Said lot No. 3379 containing 28.25 acres of land, more or less.

Now know ye, that there is therefore, hereby granted by the United States unto the said Simeon V. Kemper and Josephine Lorenz and to their heirs and assigns, the said placer mining premises hereinbefore described.

To have and to hold said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said grantees above named, and to their heirs and assigns forever; subject nevertheless, to the following conditions and stipulations:

First. That the grant hereby made is restricted in its exterior limits to the boundaries of the said mining premises, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, which may have been discovered within said limits subsequent to and which were not known to exist on the eleventh day of May, A. D. 1891.

Second. That should any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, be claimed or known to exist within the above described premises at said last named date, the same is expressly excepted and excluded from these presents.

26 Third. That the premises hereby conveyed may be entered by the proprietor of any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper of other valuable deposits, for the purpose of extracting and removing the ore from such vein or lode, should the same, or any part thereof, be found to penetrate, intersect, pass through or dip into the mining ground or premises hereby granted.

Fourth. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws customs and decisions of courts. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

Fifth. That in the absence of necessary legislation by Congress the Legislature of Montana may provide rules for working the Mining claim or premises hereby granted, involving easement, drainage and other necessary means to the complete development thereof.

In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington the nineteenth day of December, in the year of our Lord one thousand eight hun-

dred and ninety five, and of the Independence of the United States the one hundred and twentieth.

By the President: GROVER CLEVELAND,
By M. McKEAN, *Secretary.*

L. Q. C. Lamar, Recorder of the General Land Office, (General Land Office Seal.)

Recorded Vol. 236, pages 313 to 316, inclusive, records of the General Land Office.

27 EXHIBIT B.

Hornet Lode Mining Claim, Summit Valley Mining District.

SILVER BOW COUNTY,
State of Montana:

The undersigned, who are citizens of the United States, hereby declare and give notice to all persons concerned that they have discovered a vein or lode bearing silver & copper and other valuable deposits, and that they did, on the 19th day of March, 1900, under and by virtue of Chapter VI, Title XXXII of the Revised Statutes of the United States, and the laws amendatory thereof, and the laws of the State of Montana, locate and claim a mining claim upon said lode or vein which was at said time and is now designated and named the "Hornet" quartz lode mining claim, extending along said vein or lode 100 feet in an eastern direction and 1,400 feet in a western direction from the center of the discovery shaft, at which a notice of location was posted on said day, as provided by law, and 300 feet on each side from the middle or center of said lode or vein at the surface; comprising in all 1500 feet in length along said vein or lode, and 600 feet in width.

The general course of said vein or lode is northwest & Southeast; with all the rights and privileges as to surface ground and lodes, veins or ledges within the boundaries of said claim, and otherwise, and the metals, minerals and valuable deposits of every kind contained in said veins, lodes or ledges or within said boundaries which are given or allowed by the laws of the United States aforesaid, or the state of Montana.

Said mining claim is situated in Summit Valley Mining District, Silver Bow County, Montana, and is about two and a half miles east of Butte, City, Montana.

The adjoining claims are the Bullwhacker on south; Bertha and Copper Queen on the east; May Molvr Placer on the north, and M. A. No. 888 on the west.

Since the date of said location the undersigned have run a crosscut and sunk a discovery shaft upon said claim which is located about 316 feet southwest from corner No. 1 of the claim, the
28 northeast corner, and its dimensions are as follows, to-wit; cleaned out old shaft 30 feet deep 3½ by 6 feet & from bottom thereof ran a crosscut 12 feet long 3 feet wide by 6 feet high; said shaft shows a well defined crevice and valuable deposit.

The location is distinctly marked on the ground as follows, to-wit:

Beginning at Corner No. 1 of this claim, the N. E. Corner, a post four inches square by four feet six inches in length and set one foot in the ground with a mound of earth and stone four feet in diameter by two feet in height around the post and marked corner post No. 1 Hornet Lode, Located March 19, 1900;

And running thence in a westerly direction 1,500 feet to corner No. 2, the N. W. corner, a post four inches square by four feet six inches in length and set one foot in the ground with a mound of earth and stone four feet in diameter by two feet in height around the post, marked corner post No. 2 Hornet Loge, located Mar. 19, 1900;

And running thence in a southerly direction 600 feet to a corner No. 3, the S. W. corner, a post four inches square by four feet six inches in length and set one foot in the ground with a mound of earth and stone four feet in diameter by two feet in height around the post and marked corner post No. 3 Hornet Lode, located Mar. 19, 1900;

And running thence in an easterly direction 1,500 feet to corner No. 4, the S. E. corner, a post four inches square by four feet six inches in length and set one foot in the ground with a mound of earth and stone four feet in diameter by two feet in height around the post, and marked corner post No. 4 Hornet Lode located Mar. 19, 1900.

And running thence in a northerly direction to corner No. 1 the place of beginning.

This is an amended location notice for record to more definitely describe said claim, the original notice being dated June 2, 1900, & duly recorded June 2, 1900.

The undersigned intend to hold this claim under and
29 according to the laws of the United States and the State of Montana, and to record this declaratory statement in the county clerk's office as provided by law.

Dated this 27th day of December, 189–.

SAMUEL KIFT,
ISAAC KNOYLN,
Locator- and Claimant-.

STATE OF MONTANA,
County of Silver Bow:

Samuel Kift, being first duly sworn on oath, says, that he is of lawful age, and one of the locators and claimants of the foregoing quartz lode mining claim; that he has read the foregoing declaratory statement, and knows the contents thereof, and the matters and things therein contained are true to his own knowledge.

SAMUEL KIFT.

Subscribed and sworn to before me this 27 day of December, 1900.

[NOTARIAL SEAL.] GEO. M. BOURQUIN,
Notary Public in and for Silver Bow County, Montana.

Recorded December 27, 1900, in Volume "U" of Lodes, at page 213.

30 EXHIBIT C.

Amended Declaratory Statement of the Rabbit Lode Mining Claim.

Notice is hereby given that R. O. Merriman, who was a citizen of the United States did, on the 8th day of May, 1900, discover a vein or lode of quartz or other rock in place bearing copper and other valuable deposits within the hereinafter described lode claim, and that he did on said day locate the same as the "Rabbit" Lode Mining Claim, by posting the notice required by law at the point of discovery.

That the general course of said vein is easterly and westerly.

That the total length of surface included and claimed in said location is 1,500 feet along the course of the vein, being 100 feet in an easterly and 1,400 feet in a westerly direction from the point of discovery; and the total width of surface is 600 feet, being 300 feet on the northerly and 300 feet on the southerly side of the middle or center of said vein.

That, within thirty days thereafter, he marked the boundaries of said claim so that they could be readily traced, by placing a post at the northwest corner of said claim, and marking the same "northwest corner No. 1 Rabbit Lode"; and from thence 600 feet in a southerly direction, placing a post at the southwest corner, and marking the same "Southwest corner No. 2 Rabbit Lode"; and from thence in an easterly direction 1,500 feet, placing a post at the southeast corner, and marking the same "Southeast corner No. 3 Rabbit Lode"; and from thence 600 feet northerly, placing a post at the northeast corner, and marking the same "Northeast corner No. 4, Rabbit Lode";

That the exterior boundaries of said claim is a line extending from post to post around said claim.

That each of said posts was not less than four inches square and four feet six inches in length and was set one foot in the ground and had a mound of earth four feet in diameter and two feet in height around the same.

31 That, from the point of discovery and said discovery shaft, Rand's Milk Ranch is distant about 2,000 feet in a northerly direction; Columbia Gardens is distant about 400 ft. in an easterly direction.

That the Copper Queen Lode Mining Claim adjoins said location on the north; the Bertha Lode Claim on the east, and on the west Placer Application No. 888.

That, for the purpose of perfecting said location, said locator did, within thirty days after the posting of said notice of location, sink, or cause to be sunk a discovery shaft at the point of discovery, three feet wide by eight feet long and ten and one-half feet deep; and that said shaft disclosed a well defined crevice and valuable deposit of ore ten feet below the lowest part of the rim of said shaft at the surface, and that said shaft was sunk from the surface of the ground.

That within thirty days thereafter, he verified and filed in the office of the County Clerk and Recorder of Silver Bow County, Montana, a declaratory statement, which is recorded on page 94 of Book

"Q" of Declaratory Statements, records of said county, to which reference is hereby made and the same, by this reference, is hereby incorporated herein and made a part of this amended declaratory statement.

That the undersigned affiant is the successor in interest of said locator in an undivided interest in said lode claim, and that, as such, she makes this amended declaratory statement for the purpose of obtaining the benefit to said locator and herself and co-owners of the act of the legislative assembly of the state of Montana, of March 15th, 1901, with reference to filing additional or amended declaratory statement, and for the purpose of correcting any mistake or imperfection in said declaratory statement, and without relinquishing any right under said location and said declaratory statement.

32 The premises included in this Location were, in whole or in part, heretofore located and claimed under the Point Pleasant, Pleasant View and Hornet locations.

L. O. CLARK,
One of the Successors in Interest of
R. O. Merriman, Locator and Claimant.

STATE OF MONTANA,
County of Silver Bow, ss:

L. O. Clark, being duly sworn on oath, deposes and says: That she is one of the successors in interest of an undivided interest of R. O. Merriman, the locator and claimant of the Rabbit Lode Mining Claim, described in the foregoing amended declaratory statement; that said amended declaratory statement is made by her in good faith, and to secure the benefit of the laws of the state of Montana in her behalf and that of said Merriman and her other co-owners in said claim; that she has heard read the foregoing amended declaratory statement, and knows the contents thereof, and that all the matters therein contained are true.

L. O. CLARK.

Subscribed and sworn to before me this 29th day of September, 1906.

[NOTARIAL SEAL.]

FRANK L. RILEY,
Notary Public in and for the
County of Silver Bow, Montana.

Recorded September 29, 1906, in Volume "Z" of Lodes, page 217.

33 EXHIBIT D.

Amended Declaratory Statement of the Hope Lode Mining Claim.

Notice is hereby given that R. O. Merriman, who was a citizen of the United States, did, on the 13th day of May, 1900, discover a vein or lode of quartz or other rock in place, bearing gold, copper and other valuable deposits within the boundaries of the hereinafter de-

scribed lode claim, and did locate the said vein or lode and lode claim as the "Hope" Lode Mining Claim.

That the general course of the said vein is easterly and westerly. That he posted the notice required by law at the point of discovery.

That he claimed 1,500 feet along the course of the vein, being 550 feet in an easterly direction and 950 feet in a westerly direction from the said point of discovery, and 600 feet in width of surface, being 300 feet on the northerly side and 300 feet on the southerly side of the center or middle of said vein.

That, within thirty days thereafter, he marked the boundaries of said location so that they could be readily traced.

That he placed a post at the northeast corner of said location and marked the same "Northeast corner No. 1, Hope Lode";

Thence in a westerly direction 1,500 feet to the northwest corner, at which he placed a post, marked "Northwest corner No. 2, Hope Lode";

And from thence in a southerly direction, 600 feet, to the southwest corner, at which he placed a post and marked the same "Southwest corner No. 3, Hope Lode";

And from thence running easterly 1,500 feet, to the southeast corner, at which he placed a post, marked "Southeast corner No. 4, Hope Lode".

That each of said posts was not less than four inches square, by four feet six inches in length, and was set one foot in the ground, and had a mound of earth four feet in diameter by two feet in height, around the same.

34 That the exterior boundaries of said claim is a line extending from one of said posts to the other, around the claim.

That said claim is situated in Section 16 Township 3 North, Range 7 west, Silver Bow County, Montana.

That the discovery shaft is situated at the point of discovery, and is located 550 feet from the easterly end, and 950 feet from the westerly end, thereof.

That measured from said discovery shaft, which is at the point of discovery, as initial point, the following natural objects and permanent monuments are distant as follows, to-wit:

The new Northern Pacific roundhouse is distant about three-fourths of a mile in a westerly direction, and the Brundy House is distant about two thousand feet in a southerly direction.

That the adjoining claim on the east is the Bertha Lode Claim, and on the south is the Bullwhacker lode claim.

That within thirty days from the date of discovery and posting said notice, said locator for the purpose of perfecting said location, sunk, or caused to be sunk at the point of discovery, a discovery shaft 3½ feet wide by 5 feet long, to the depth of 12 feet, and for the balance of the depth, 3½ feet wide by 3½ long, to the entire depth of 22½ feet; and that said shaft disclosed a well defined crevice and valuable deposit of ore more than 10 feet beneath the lowest part of the rim of the same at the surface, and that said shaft was sunk from the surface.

That, within said thirty days, said locator verified, by his oath, and filed in the office of the county clerk and recorder of Silver Bow

County, Montana, a declaratory stat-ment of said lode claim, and that the same is of record on page 97 of Book "Q" of Declaratory Statements, Records of Silver Bow County, Montana, to which reference is hereby made, and the same, by said reference, is
35 hereby incorporated herein and made a part of this amended declaratory statement.

That the undersigned affiant is the successor in interest of said locator in an undivided interest in said lode claim, and that, as such, she makes this amended declaratory statement for the purpose of obtaining the benefit to said locator and herself and co-owners of the act of the legislative assembly of the state of Montana of March 15th, 1901, with reference to filing additional or amended declaratory statements, and for the purpose of correcting any mistake or imperfection in said declaratory statement, and without relinquishing any right under said location and said declaratory statement.

The premises included in this location were in whole or in part, heretofore located and claimed under the Point Pleasant and Pleasant View and Hornet Locations.

L. O. CLARK,
One of the Successors in Interest of R. O. Merriman, Locator and Claimant.

STATE OF MONTANA,
County of Silver Bow, ss:

L. O. Clark, being duly sworn on oath, deposes and says: that she is one of the successors in interest of an undivided interest of R. O. Merriman, the locator and claimant of the Hope Lode Mining Claim, described in the for-going amended declaratory statement; that said amended declaratory statement is made by her in good faith, and to secure the benefit of the laws of the state of Montana in her behalf, and that of said Merriman and her other co-owners in said claim; that she has heard read the foregoing amended declaratory statement and knows the contents thereof, and that all the matters therein contained are true.

L. O. CLARK.

36 Subscribed and sworn to before me this 29th day of September, 1906.

[NOTARIAL SEAL.] FRANK L. RILEY,
Notary Public in and for the County of Silver Bow, Montana.

Recorded September 29, 1906, in Volume "Z" of Lodes, at page 213.

37 EXHIBIT E.

Amended Declaratory Statement of the Olivia Lode Mining Claim.

Notice is hereby given that R. O. Merriman, who was a citizen of the United States, did, on the 16th day of May, 1900, discover a vein or lode of quartz and other rock in place, bearing gold, copper and other valuable deposits within the boundaries of the claim hereinafter described, and that he did, on said day, locate the same as the "Olivia" Lode Mining claim, by posting the notice required by law at the point of discovery.

That the general course of the vein is easterly and westerly.

That the total of surface claimed and included in said location is 1,500 feet along the course of the vein, being 325 feet in an easterly direction and 1,175 feet in a westerly direction from the said point of discovery; and that the total width of surface is 600 feet, being 300 feet on the northerly side and 300 feet on the southerly side, of said vein.

That, within thirty days thereafter, he marked the boundaries of said claim so that they could be readily traced by placing a post at each corner thereof, to-wit:

By placing a post at the northeast corner, and marking the same "Northeast Corner No. 1 Olivia Lode," by placing a post at the northwest corner 1,500 feet westerly therefrom, and marking the same "Northwest corner No. 2, Olivia Lode"; by placing a post at the southwest corner, 600 feet southerly therefrom, and marking the same "Southwest corner No. 3 Olivia Lode"; and by placing a post at the southeast corner, 1,500 feet easterly therefrom, and marking the same "Southeast corner No. 4 Olivia Lode:

That the exterior boundaries of said claim is a line extending from one of said posts to the other, around the claim.

That each of said posts was not less than four inches square by four feet six inches in length, and was set one foot in the
38 ground and had a mound of earth four feet in diameter and two feet in height around the same.

That said lode claim is situated in section 16, township 3 north, range 7 west, Silver Bow County, Montana.

That measured from the point of discovery *and* the new Northern Pacific roundhouse is distant about three-fourths of a mile in a westerly direction.

That to the north and adjoining or lying a short distance therefrom is the Copper Queen Lode Mining Claim.

That said locator, for the purpose of perfecting said location, did, within thirty days after the date of discovery and posting said notice of location, sink a discovery shaft, at the point of discovery, which discovery shaft is 3½ feet wide by 5 feet long and 10½ feet deep, and which disclosed a well defined crevice and valuable deposit of ore ten and one half feet below the surface of the ground, at the lowest part of the rim of said shaft, and which shaft was sunk from the surface.

That, within thirty days after said posting, said locator verified

by his oath, and filed in the office of the County Clerk and Recorder of Silver Bow County, Montana, a declaratory statement which is of record at page 95 of Book "Q" of Declaratory Statements, Records of said County, to which reference is hereby made and the same, by this reference, is hereby incorporated herein and made a part of this amended declaratory statement.

That the undersigned affiant is the successor in interest of said locator in an undivided interest in said lode claim, and that, as such, she makes this amended declaratory statement for the purpose of obtaining the benefit to said locator and herself and co-owners of the act of the legislative assembly of the state of Montana of March 15th, 1901, with reference to filing additional or amended declaratory statements, and for the purpose of correcting any mistakes or imperfections in said declaratory statement, and without relinquishing any right under said location and said declaratory statement.

39 The premises included in this location were, in whole or in part, heretofore located and claimed under the Point Pleasant, Pleasant View and Hornet locations.

L. O. CLARK,
One of the Successors in Interest of
R. O. Merriman, Locator and Claimant.

STATE OF MONTANA,
County of Silver Bow, ss:

L. O. Clark, being duly sworn on oath, deposes and says: That she is one of the successors in interest of an undivided interest of R. O. Merriman, the locator and claimant of the Olivia Lode Mining Claim, described in the foregoing amended declaratory statement; that said amended declaratory statement is made by her in good faith, and to secure the benefit of the laws of the state of Montana in her behalf, and that of said Merriman and her other co-owners *is* said claim; that she has heard read the foregoing amended declaratory statement, and knows the contents thereof and that all the matters therein contained are true.

L. O. CLARK.

Subscribed and sworn to before me this 29th day of September, 1906.

[NOTARIAL SEAL.] FRANK L. RILEY,
Notary Public in and for the County of
Silver Bow, Montana.

Recorded September 29, 1906, in Volume "Z" of Lodes, at page 215.

40 EXHIBIT F.

Declaratory Statement of Gulf Lode Mining Claim.

Notice is hereby given that the undersigned who is a citizen of the United States has discovered a vein of quartz or other rock in place bearing gold and copper and other valuable deposits and after said discovery, to-wit, on the 1st day of May, 1900, did locate said lode as the Gulf lode mining claim by posting the notice required by law at the point of discovery.

The general course of the vein is easterly and westerly. The total length of surface included in said location is 1,500 feet along the course of the vein, being 100 feet in an easterly direction and 1,400 feet in a westerly direction from the said point of discovery and the total width of the said surface is 600 feet, being 300 feet on the north and 300 feet on the south side of the middle of the vein.

The boundaries of the said location are so distinctly marked upon the ground that they can be readily traced being more particularly described as follows, to-wit:

Beginning at the northeast corner which is marked by a post not less than four inches square and four feet six inches in leng*ht* set one foot in the ground, marked northeast corner No. 1 Gulf Lode, with a mound of earth four feet in diameter by two feet in height around said post; and running thence in a westerly direction fifteen hundred feet to the northwest corner, which is marked by a post not less than four inches square and four feet six inches in length, set one foot in the ground, marked northwest corner No. 2, Gulf Lode, with a mound of earth four feet in diameter and two feet in height around said post; and running thence in a southerly direction six hundred feet to the southwest corner, which is marked by a post not less than four inches square by four feet six inches in leng*ht*, set one foot in the ground, marked southwest corner No. 3, Gulf Lode, with a mound of earth four feet in diameter and two feet in height around said post; and running thence in an easterly direction fifteen hundred feet to the southeast corner No. 4, Gulf Lode, with a mound of earth four feet in diam-
41 eter and two feet in height around said post; and running thence in a northerly direction six hundred feet to the place of beginning.

The said claim is situated in Summit Valley Mining District, Silver Bow County, Montana, and measured from discovery point of said claim as an initial point. The following natural objects and permanent monuments are distance as follows, to-wit:

New Northern Pacific roundhouse is distant about three and a quarter miles in a westerly direction. The adjoining claims are as follows, to-wit: On the Northeast the Bertha lode mining claim, on the east the — lode mining claim, on the south the — lode mining claim, on the west the — lode mining claim. This claim is situated in section 16, township 3 N., R. 7 W., Montana meridian.

For the purpose of perfecting the location of this claim as required by law the under-signed has heretofore and within ninety days of posting said notice of location done or caused to be done the following development work upon said claim, to-wit:

Sinking a discovery shaft twenty-two feet deep and three and half feet by seven feet in dimensions, and said development work has disclosed a well-defined *crevasse* and valuable deposit of ore. The undivided interest in the above described location claimed by each of the undersigned is indicated by the fraction set after each name.

R. O. MERRIMAN,
Locator and Claimant.

STATE OF MONTANA,
County of Silver Bow, ss:

R. O. Merriman, being duly sworn, on oath says that he is of lawful age and the locator and claimant of the mining claim described in the foregoing declaratory statement, that the said location has been made in good faith, and that he has read the said declaratory statement and knows the contents thereof and
42 that all the statements therein contained are true.

R. O. MERRIMAN.

Subscribed and sworn to before me this 22d day of May, A. D. 1900.

[NOTARIAL SEAL.] JOHN N. KIRK,
Notary Public in and for Silver Bow County, Montana.

Filed for record May 20th, 1900, at 4:10 o'clock P. M.
J. E. MORAN,
County Recorder,
By H. E. BURKE, *Deputy.*

43 EXHIBIT G.

Certificate of Location of the Wilson Quartz Lode Mining Claim.

I, Frank Walker, a citizen of the United States, of lawful age, do hereby certify and declare as follows, to-wit:

That on the 16th day of November, A. D. 1912, the Wilson Quartz Lode Mining Claim, situated in Summit Valley Mining District, county of Silver Bow, state of Montana, was duly discovered.

That on said day a written or printed notice of location of said claim was duly posted, conspicuously, at the point of discovery on said claim, which said notice contained the name of the locator, the date of the location (which said date of location was the date of the posting of such notice) and the approximate area of the claim intended to be appropriated.

That thereafter and within thirty days after the posting of said notice of location, the locator distinctly marked the location of said

claim on the ground so that its boundaries could be readily traced, by placing monuments at each corner and angle of said claim, which said monuments consists of trees, posts, stumps, stones and boulders described as follows, to-wit:

Beginning at the N. W. Cor. No. 1 of this claim, which is a post 6″ x 6″ 5 feet long and mound 4 feet wide and two feet high, post is marked Northwest Cor. No. 1 of the Wilson Lode;

Thence first course easterly a distance of 1500 feet to the Corner No. 2 of this claim, which is a mound 4 feet wide and 2 ft. high and a post 6″ x 6″ 5 feet long marked Northeast Cor. No. 2 of the Wilson Lode;

Thence second course southerly a distance of 600 feet to the — Corner No. 3 of this claim, which is a mound 4 ft. wide and 2 ft. high and post 6″ x 6″ 5 ft. long marked southeast Cor. No. 3 of the Wilson Lode;

44 Thence third course westerly a distance of 1,500 feet to the — Cor. No. 4 of this claim, which is a mound 2 ft. high and 4 ft. wide and post 6″ x 6″ 5 ft. long, marked Southwest Cor. No. 4 of the Wilson Lode;

Thence fourth course northerly a distance of 600 feet, to the N. W. Cor. No. 1, the place of beginning.

That each tree so marked was at least eight inches in diameter and blazed on four sides; that each post so marked was at least four inches square by four feet and six inches in length, set one foot in the ground, except where solid rock occurred at a less depth, in which case the post was set upon such rock and in all cases such posts were surrounded by a mound of earth and stone at least four feet in height and was surrounded by a mound of earth and stone four feet in diameter by two feet in height; that each stone so marked was at least six inches square by eighteen inches in length, set two-thirds of its length in the ground, with a mound of earth and stone alongside at least four feet in diameter by two feet in height; that each boulder so marked was at least three feet above the natural surface of the ground on the upperside of said boulder.

That within sixty days after the date of posting said notice of location, the locator named herein excavated a tunnel on said claim at the point of discovery 3 feet wide by 6 feet in height and 12 feet in length, and to the depth of at least ten feet, vertically, below the natural surface of the ground, and which said tunnel consists of at least one hundred and fifty cubic feet of excavation, said tunnel is leading from the bottom of a shaft which is 4′ x 6′ and 22 feet deep.

The said locator did there, in the bottom of said tunnel at the lowest vertical depth thereof, disclose the vein, lode or deposits so located.

The said locator claim- 150 feet in a — easterly direction and 1350 feet in a westerly direction along the course of the vein
45 each way from the discovery shaft, and 300 feet on each side of the center of the vein, the said claim located being 600 feet wide by 1,500 feet in length.

That the following reference is hereby made to natural objects

and permanent monuments so as to identify said claim, to-wit; (none given).

That the following claims adjoin this claim, to-wit:

On the South the Bull Whacker quartz lode mining claim.

That the claim so located, marked and designated as aforesaid, is named and known as the Wilson quartz lode mining claim, and it is situate in Summit Valley Mining District, county of Silver Bow, state of Montana.

That the name of the locator and claimant follows, and the undivided interest in the above described location claimed by each of the undersigned is indicated by the fraction set after each name.

FRANK WALKER,
Locator and Claimant.

STATE OF MONTANA,
County of Silver Bow, ss:

Frank Walker, being first duly sworn, on his oath, says: That he is a citizen of the United —— and that he is of lawful age; That he is the locator and claimant of the Wilson Quartz Lode Mining Claim; That said location is made in good faith; That this "Certificate of Location" is made in good faith and for the purpose of securing and enjoying all the rights and benefits of Chapter 16 of the Laws of 1907, passed by the Legislative Assembly of the state of Montana, entitled "An Act Governing the Manner of Locating, Recording and Holding Possession of Mining Claims upon the Public Domain of the United States within the state of Montana," approved February 18, 1907; and that the matters and things stated in the foregoing "Certificate of Location" are true of his own knowledge.

46 Subscribed and sworn to before me this 20th day of Nov., A. D. 1912.

[NOTARIAL SEAL.] CHAS. MATTISON,
Notary Public for the State of Montana,
Residing at Butte, Montana.

My Commission expires Oct. 10-14.

Recorded November 22, 1912, in Volume No. 10 of Quartz Lode Locations, at page 47.

47 EXHIBIT H.

Certificate of Location of the Marshall Quartz Lode Mining Claim.

I, Frank Walker, a citizen of the United States, of lawful age do hereby certify and declare as follows, to-wit:

That on the 16th day of November, A. D. 1912, the Marshall quartz lode mining claim, situated in Summit Valley Mining District county of Silver Bow, State of Montana, was duly discovered.

That on said day a written or printed notice of location of said claim was duly posted, conspicuously, at the point of discovery on

said claim, which said notice contained the name of the locator, the date of the location (which said date of location was the date of the posting of such notice), and the approximate area of the claim intended to be appropriated.

That thereafter and within thirty days after the posting of said notice of location the locator distinctly marked the location of said claim on the ground so that its boundaries could be readily traced by placing monuments at each corner and angle of said claim, which said monuments consists of trees, posts stumps, stones and boundaries described as follows, to-wit:

Beginning at the N. W. Cor. No. 1 of this claim, which is a mound 2 ft. high and 4 ft. wide and post 6" x 6" 5 ft. long marked Northwest Corner No. 1 of the Marshall Lode;

Thence first course easterly a distance of 1,500 feet to the N. E. cor. No. 2 of this claim, which is a mound 2 ft. high and 4 ft. wide, and post 6" x 6" 5 ft. long, marked Northeast Cor. No. 2 of the Marshall Lode;

Thence, second course, southerly, a distance of 600 feet to the S. E. Cor. No. 3 of this claim, which is a mound 2 ft. wide and 4 ft. wide, and post 6" x 6" and 5 Ft. long, marked Southeast Cor. No. 3 of the Marshall Lode;

Thence fourth Course Northerly a distance of 600 feet to
48 the N. W. Cor. No. 1, the place of beginning.

That each tree so marked was at least eight inches in diameter and blazed on four sides; that each post so marked was at least four inches square by four feet and six inches in length, set one foot in the ground, except where solid rock occurred at a less depth, in which case the post was set upon such rock and in all cases such posts were surrounded by a mound of earth and stone at least four feet in diameter by two feet in height; that each stump so marked was squared and was at least eight inches in diameter by four feet in height and was surrounded by a mound of earth and stone four feet in diameter by two feet in height; that each stone so marked was at least six inches square by eighteen inches in length, set two-thirds of its length in the ground, with a mound of earth and stone alongside at least four feet in diameter by two feet above the natural surface of the ground on the upper side of said boulder.

That within sixty days after the date of posting said notice of location, the locator named herein excavated a tunnel on said claim at the point of discovery 3 feet wide by 6 feet in height and 11 feet in length, and to the depth of at least ten feet, vertically, below the natural surface of the ground, and which said tunnel consists of at least one hundred and fifty cubic feet in excavation, said tunnel is leading from the bottom of a shaft 20 ft. deep 4 x 6 ft. square.

That said locator did there, in the bottom of said tunnel at the lowest vertical depth thereof, disclose a vein, lode or deposit so located.

That said locator claim- 300 feet in a — easterly direction and 1,200 feet in a westerly direction along the course of the vein each way from the discovery shaft, and 300 feet on each side of the cen-

ter of the vein, the said claim located being 600 feet wide by 1,500 feet in length.

That the following reference is hereby made to natural
49 objects and permanent monuments so as to identify said claim, to-wit: (none given).

That the following claims adjoin this claim to-wit:

On the north the Cop-er Queen and Rising Sun Quartz Lode Mining Claim-.

That the claim so located, marked and designated as aforesaid, is named and known as the Marshall Quartz Lode Mining Claim, and it is situate in Summit Valley Mining District, county of Silver Bow, state of Montana.

That the name of the locator and claimant follows, and the undivided interest in the above described location claimed by each of the undersigned is indicated by the fraction set after each name.

FRANK WALKER,
Locator and Claimant.

STATE OF MONTANA,
County of Silver Bow, ss:

Frank Walker, being first duly sworn, on his oath, says: That he is a citizen of the United States and that he is of lawful age; that he is the locator and claimant of the Marshall quartz lode mining claim; that said location is made in good faith; that this "Certificate of Location" is made in good faith and for the purpose of securing and enjoying all the rights and benefits of Chapter 16, of the laws of 1907, passed by the Legislative Assembly of the State of Montana, entitled "An Act Governing the manner of Location, Recording and Holding Possession of Mining Claims upon the Public Domain of the United States within the state of Montana," approved February 18, 1905; and that the matters and things stated in the fore-
50 going "Certificate of Location" are true of his own knowledge.

FRANK WALKER.

Subscribed and sworn to before me this 20th day of Nov., A. D. 1912.

[NOTARIAL SEAL.] CHAS. MATTISON,
Notary Public for the State of Montana,
Residing at Butte, Mont.

My Commission expires Oct. 10, '14.

Recorded November 22, 1912, in Volume No. 10 of Quartz Lode Locations, at page 46.

51 EXHIBIT I.

Certification of Location of the Wrangle Quartz Lode Mining Claim.

I, Frank Walker, a citizen of the United States, of Lawful age, do hereby certify and declare as follows, to-wit:

That on the 16th day of November, A. D. 1912, the Wrangle

Quartz Lode Mining Claim, situated in Summit Valley Mining District county of Silver Bow, state of Montana, was duly discovered.

That on said day a written or printed notice of location of said claim was duly posted, conspicuously, at the point of discovery on said claim, which said notice contained the name of the locator, the date of location (which said date of location was the date of posting of such notice) and the approximate area of the claim intended to be appropriated.

That thereafter and within thirty days after the posting of said notice of location, the locator distinctly marked the location of said claim on the ground, so that its boundaries could be readily traced, by placing monuments at each corner and angle of said claim, which said monuments consists of trees, posts, stumps, stones and boulders described as follows, to-wit:

Beginning at the N. W. cor. No. 1 of this claim, which is a mound two feet high and 4 feet wide and a post 5 feet long, 6″ x 6″ marked Northwest Cor. No. 1 of the Wrangle lode;

Thence first course easterly a distance of 1500 feet to the N. E. Cor. No. 2 of this claim, which is a mound 2 feet high and 4 feet wide, and post 6″ x 6″ 5 feet long marked Northeast Cor. No. 2 of the Wrangle Lode;

Thence second course southerly a distance of 600 feet to the S. E. Cor. No. 3 of this claim, which is a mound 2 ft. high and 4 ft. wide and post 6″ x 6″ 5 ft. long marked S. E. Cor. No. 3 of the Wrangle Lode.

52 Thence third course westerly a distance of 1500 feet to the S. W. Cor. No. 4 of this claim, which is a mound 2 ft. high and 4 ft. wide and post 6″ x 6″ 5 ft. long, marked S. W. Cor. No. 4 of the Wrangle Lode;

Thence fourth course Northerly, a distance of 600 feet to the N. W. Cor. No. 1, the place of beginning.

That each tree so marked was at least eight inches in diameter and blazed on four sides; that each post so marked was at least four inches square by four feet and six inches in length, set one foot in the ground, except where solid rock occurred at a less depth, in which case the post was set upon such rock and in all cases such posts were surrounded by a mound of earth and stone at least four feet in diameter by two feet in height; that each stump so marked was squared and was at least eight inches in diameter by four feet in height and was surrounded by a mound of earth and stone four feet in diameter by two feet in height; that each stone so marked was at least six inches square by eighteen inches in length, set two-thirds of its length in the ground, with a mound of earth and stone alongside at least four feet in diameter by two feet in height; that each boulder so marked was at least three feet above the natural surface of the ground on the upper side of said boulder.

That within sixty days after the date of posting said notice of location, the locator named herein excavated a tunnel on said claim at the point of discovery 2½ — wide by 5 ft. in height and 13 feet in length and to the depth of at least ten feet, vertically, below the natural surface of the ground, and which said tunnel consists of at least one hundred and fifty cubic feet of excavation.

That said locator did there, in the bottom of said tunnel at the lowest vertical depth thereof, disclose the vein, lode or deposit so located; the tunnel is run from a shaft 5′ x 6′ 6″ 31 feet deep
53 in a northerly direction.

The said locator claim- 350 feet in a- easterly direction and 1150 feet in a westerly direction along the course of the vein each way from the discovery shaft, and 300 feet on each side of the center of therein, the said claim located being 600 feet wide and 1500 feet in length.

That the following reference is hereby made to natural objects and permanent monuments so as to identify said claim, to-wit: (None given.)

That the following claims adjoin this claim, to-wit:

On the North the Bertha and Copper Queen Quartz Lode Mining claim.

On the South the Bull Whacker Quartz Lode Mining Claim;

On the east the Bertha Quartz Lode Mining Claim;

On the West the Wilson and Marshall Quartz Lode Mining claim.

That the claim so located, marked and designated as aforesaid is named and known as the Wrangle Quartz Lode Mining Claim, and it is situate in Summit Valley Mining District, County of Silver Bow, State of Montana.

That the name of the locator and claimant follows, and the undivided interest in the above described location claimed by each of the undersigned is indicated by the fraction set after each name.

FRANK WALKER,
Locator and Claimant.

STATE OF MONTANA,
County of Silver Bow:

Frank Walker, being first duly sworn, on his oath, says: That he is a citizen of the United States and that he is of lawful age; that he is the locator and claimant of the Wrangle Quartz Lode Mining Claim; that said location is made in good faith; that this
54 "Certificate of Location" is made in good faith and for the purpose of securing and enjoying all the rights and benefits of Chapter 16 of the Laws of 1907, passed by the Legislative Assembly of the state of Montana, entitled "An Act Governing the Manner of Locating, Recording and Holding Possession of Mining Claims upon the Public Domain of the United States within the state of Montana," approved February 18, 1907; and that the matters and things stated in the foregoing "Certificate of Location" are true of his own knowledge.

Subscribed and sworn to before me this 14th day of January, A. D. 1913.

[NOTARIAL SEAL.] ALLEN P. BOWIE,
Notary Public for the State of Montana,
Residing at Butte, Mont.

My Commission expires Feb. 27″, 1915.

Recorded January 14, 1913, in Volume No. 10 of Quartz Lode Locations, at page 78.

55 EXHIBIT J.

Certificate of Location of the Helen Quartz Lode Mining Claim.

I, Clinton C. Clark, a citizen of the United States, of lawful age, do hereby certify and declare as follows, to wit:

That on the 20th day of November, A. D. 1912, the Helen Quartz Lode Mining Claim situated in Summit Valley Mining District, county of Silver Bow, state of Montana, was duly discovered.

That on said day a written or printed Notice of location of said claim was duly posted, conspicuously, at the point of discovery on said claim, which said notice contained the name of the locator, the date of the location (which said date of location was the date of the posting of such notice) and the approximate area of the claim intended to be appropriated.

That thereafter and within thirty days after the posting of said notice of location, the locator distinctly marked the location of said claim on the ground so that its boundaries could be readily traced, by placing monuments at each corner and angle of said claim, which said monuments consist of posts as follows, to-wit:

Beginning at the N. E. Cor. No. 1 of this claim, which is a post 4″ 6″ x 5 feet long set one foot in the ground, marked Helen Lode Cor. No. 1 of the said Lode;

Thence first course southerly a distance of 600 feet to the S. E. Cor. No. 2 of this claim, which is a post 4″ x 6″ x five feet set one foot in the ground, marked S. E. Cor. No. 2 of the Helen Lode;

Thence second course westerly a distance of 1500 feet to the S. W. Cor. No. 3 of this claim, which is a post 4″ x 6″ x five feet set one foot in the ground, marked S. E. Cor. No. 2 of the Helen Lode;

56 Thence third course northerly a distance of 600 feet to the N. W. Cor. No. 4 of this claim, which is a post 4″ x 6″ x 5 feet set one foot in the ground, marked N. W. Cor. No. 4 of the Helen Lode;

Thence fourth course easterly a distance of 1500 feet to the N. E. Cor. No. 1, *of* the place of beginning.

That each post so marked was at least four inches square by four feet and six inches in length, set one foot in the ground, and in all cases such posts were surrounded by a mound of earth and stone at least four feet in diameter by two feet in height.

That within sixty days after the date of posting said notice of location, the locator named herein sunk a discovery shaft on said claim at the point of discovery four feet by five feet, to the depth of at least sixteen (16) feet, vertically, below the lowest part of the rim of such shaft at the surface, and that cubical contents of said shaft excavated is not less than one hundred and fifty cubic feet.

That said locator did there, in the bottom of said shaft, at the lowest vertical depth thereof, disclose the vein, lode and deposit so located, by showing the said lead in place, and by showing the well defined walls thereof.

That the following reference is hereby made to natural objects and permanent monuments so as to identify said claim, to-wit the adjoining claims are the Ella, Rising Sun and Copper Queen on the North, and on the east are the Bertha, Pacific and Colleen Bawn Lodes, and on the south is the Bullwhacker, and that the following claims adjoin this claim, to-wit: as herein described and are permanent monuments and natural objects.

That the claim so located, marked and designated as aforesaid is named and known as the Helen Quartz Lode Mining Claim, and it is situate in Summit Valley Mining District, county of Silver
57 Bow, state of Montana.

CLINTON C. CLARK,
Locator and Claimant.

STATE OF MONTANA,
County of Silver Bow, ss:

Clinton C. Clark, Being first duly sworn, on his oath, says: That he is a citizen of the United States, and that he is of lawful age; that he is the locator and claimant of the Helen Quartz Lode Mining Claim; that said location is made in good faith; that this "Certificate of Location" is made in good faith and for the purpose of securing and enjoying all the rights and benefits of Chapter 16 of the Laws of 1907, passed by the Legislative Assembly of the state of Montana, entitled "An Act Governing the Manner of Locating, Recording and Holding Possession of Mining Claims upon the Public Domain of the United States within the state of Montana," approved February 18, 1907; and that the matters and things stated in the foregoing "Certificate of Location" are true of his own knowledge.

CLINTON C. CLARK.

Subscribed and sworn to before me this 13th day of January, A. D. 1913.

[NOTARIAL SEAL.] J. E. HEALY,
Notary Public for the State of Montana,
Residing at Butte.

My Commission expires May 15, 1914.

Recorded January 14, 1913, in Volume No. 10 of Quartz Lode Locations, at page 79.

(Endorsed:) In the District Court of the United States, in and for the District of Montana. Olivia H. Hopkins, et al., Complainants, vs. Frank Walker, et al., Defendants. Bill. Filed Dec. 31, 1914, 3:17 P. M. Geo. W. Sproule, Clerk, by Harry H. Walker, Deputy Clerk.

The motion of defendant Elizabeth Brown to dismiss said bill, filed herein January 22, 1915, is in words and figures as follows, to-wit:

58 In the District Court of the United States in and for the District of Montana.

In Equity. No. —.

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY (a Corporation), and Anaconda Copper Mining Company (a Corporation), Complainants,

v.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, Johanna Farlin, A. F. Bushnell, Patrick Leroux, J. T. Fitzgerald, Elizabeth Brown, C. B. Nolan, W. D. Thornton, Nancy Hobbs, Lou H. Hadwick, Annie Stalker, M. F. Cleary, E. J. Cleary, Adolph Keppler, J. B. Woods, Rachael Merriman, Bertha McGowan and Alice McGowan, Defendants.

Motion to Dismiss Bill of Complaint.

Now comes the defendant Elizabeth Brown, above named, and moves the court to dismiss the bill of complaint herein for the following reasons and on the following grounds:

(*a*) That the facts stated in said bill of complaint do not entitle the plaintiffs to the relief prayed for, or to any relief, in the above entitled court.

59 (*b*) That, on the facts stated in said bill of complaint, the above entitled court is without jurisdiction to try said cause.

FRED J. FURMAN,
A. J. VERHEYEN,
Attorneys for Moving Defendant.

Service of the above and foregoing Motion to Dismiss the Bill of Complaint is hereby acknowledged, and copy thereof received, this — day of January, A. D. 1915.

J. L. TEMPLEMAN,
JNO. A. SHELTON,
Solicitor for Complainant,
Washington Butte Mining Co.

(Endorsed:) No. 21. In the District Court of the United States, for the District of Montana. Olivia H. Hopkins, et al., Complainants, v. Frank Walker, et al., Defendants. Motion of defendant Elizabeth Brown to dismiss bill of complaint. Filed Jan. 22, 1915. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy Clerk. Fred J. Furman, A. J. Verheyen, Attorneys for Moving Defendant, Elizabeth Brown.

The motion of defendants Frank Walker, Clinton C. Clark, Louis Mason, L. O. Clark, Johanna Farlin, J. T. Fitzgerald, C. B. Nolan, Racheal Merriman, M. F. Cleary, E. J. Cleary, Adolph Keppler and

J. B. Woods, to dismiss said bill, filed herein January 21, 1915, is in words and figures as follows, to-wit:

60 In the District Court of the United States in and for the District of Montana.

In Equity.

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY (a Corporation), and Anaconda Copper Mining Company (a Corporation), Complainants,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, Johanna Farlin, A. F. Bushnell, Patrick Leroux, J. T. Fitzgerald, Elizabeth Brown, C. B. Nolan, W. D. Thornton, Nancy Hobbs, Lou H. Hadwick, Annie Stalker, M. F. Cleary, E. J. Cleary, Adolph Keppler, J. B. Woods, Rachael Merriman, Bertha McGowan and Alice McGowan, Defendants.

Motion to Dismiss Bill of Complaint.

Now come the defendants, Frank Walker, Clinton C. Clark, Louis Mason, L. C. Clark, Johanna Farlin J. T. Fitzgerald, C. B. Nolan, Rachael Merriman, M. F. Cleary, E. J. Cleary, Adolph Keppler and J. B. Woods, above named, and move the Court to dismiss the Bill of Complaint herein for the following reasons and on the following grounds:

A. That the facts stated in said Bill of Complaint do not entitle the plaintiffs to the relief prayed for or to any relief in the above entitled Court.

B. That on the facts stated in said Bill of Complaint, the
61 above entitled Court is without jurisdiction to try said cause.

C. B. NOLAN,
T. J. WALSH AND
JAMES T. FITZGERALD,
Attorneys for Moving Defendants.

Service of the within and foregoing Motion to Dismiss the Bill of Complaint admitted, and copy thereof received this 21st day of January, 1915.

J. L. TEMPLEMAN,
JOHN A. SHELTON,
Solicitors for Complainant, Washington-Butte Mining Co.

(Endorsed:) No. 21. In the District Court of the United States, in and for the District of Montana. Olivia H. Hopkins, et al., Complainants, vs. Frank Walker, et al., Defendants. Motion to Dismiss Bill of Complaint. Filed Jan. 21, 1915. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy. C. B. Nolan, T. J. Walsh and James T. Fitzgerald, Attorneys for Moving Defendants.

The motion of defendant Nancy Hobbs to dismiss said bill, filed herein February 4, 1915, is in words and figures as follows, to-wit:

62 In the District Court of the United States in and for the District of Montana.

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, a Corporation, and Anaconda Copper Mining Company (a Corporation), Complainants,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, Johanna Farlin, A. F. Bushnell, Patrick Leroux, J. T. Fitzgerald, Elizabeth Brown, C. B. Nolan, W. D. Thornton, Nancy Hobbs, Lou H. Hadwick, Annie Stalker, M. F. Cleary, E. J. Cleary, Adolph Keppler, J. B. Woods, Rachael Merriman, Bertha McGowan and Alice McGowan, Defendants.

Motion to Dismiss Bill of Complaint.

Comes now the defendant, Nancy Hobbs, above-named, and moves the court to dismiss the Bill of Complaint herein, for the following reasons, and upon the following grounds, to-wit:

A. That the facts in said Bill of Complaint do not entitle the plaintiffs to the relief prayed for, or to any relief in the above entitled court.

B. That on the facts stated in said Bill of Complaint, the above entitled court is without jurisdiction to try said cause.

E. H. POWERS,
JOHN A. SMITH,
Att'ys for Moving Defendant.

Service of the within and foregoing Motion to dismiss the Bill of Complaint admitted, and copy received this 4th day of February, 1915.

H. C. HOPKINS,
Solicitor for Complainant, Olivia H. Hopkins.
J. L. TEMPLEMAN,
JOHN A. SHELTON,
Solicitor- for Complainant,
Washington-Butte M'n'g Co., a Corporation.

L. O. EVANS,
Solicitor for Complainant,
Anaconda Copper M'n'g Co., a Corporation.

(Endorsed:) No. 21. In the District Court of the United States, in and for the District of Montana. Olivia H. Hopkins, et al., Complainants, vs. Frank Walker, et al., Defendants. Motion of Nancy Hobbs to dismiss bill of Complaint. Filed Feb. 4, 1915. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy Clerk. E. H. Powers, John A. Smith, Att'ys for Defendant Nancy Hobbs.

63 The motion of defendants Bertha McGowan and Alice McGowan to dismiss said bill, filed herein July 1, 1915, is in words and figures as follows, to-wit:

In the District Court of the United States in and for the District of Montana.

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, a Corporation, and Anaconda Copper Mining Company (a Corporation), Complainants,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, Johanna Farlin, A. F. Bushnell, Patrick Leroux, J. T. Fitzgerald, Elizabeth Brown, C. B. Nolan, W. D. Thornton, Nancy Hobbs, Lou H. Hadwick, Annie Stalker, M. F. Cleary, E. J. Cleary, Adolph Keppler, J. B. Woods, Rachael Merriman, Bertha McGowan and Alice McGowan, Defendants.

Motion to Dismiss Bill of Complaint.

Comes now the defendants, Bertna McGowan and Alice McGowan, by their guardian ad litem, John A. Smith, and move the court to dismiss the Bill of Complaint herein, for the following reasons, and upon the following grounds, to-wit—

A. That the facts in said Bill of Complaint do not entitle the plaintiffs to the relief prayed for, or to any relief in the above entitled court.

B. That on the facts stated in said Bill of Complaint, the above entitled court is without jurisdiction to try said cause.

JOHN A. SMITH,
Att'y for Moving Defendants.

Service of the within and foregoing Motion to dismiss the Bill of Complaint admitted, and copy received this 1st day of July, 1915.

H. C. HOPKINS,
Solicitor for Complainant, Olivia H. Hopkins.
J. L. TEMPLEMAN,
JOHN A. SHELTON,
Solicitor- for Complainant,
Washington-Butte M'n'g Co., a Corporation.

L. O. EVANS,
W. B. RODGERS,
D. GAY STIVERS,
D. M. KELLY,
Solicitor- for Complainant,
Anaconda Copper M'n'g Co., a Corporation.

(Endorsed:) No. 21. In the District Court of the United States, in and for the District of Montana. Olivia H. Hopkins, et al., Complainants, vs. Frank Walker, et al., Defendants. Motion of

Bertha McGowan and Alice McGowan to dismiss Bill of Complaint. Filed July 1, 1915. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy Clerk. John A. Smith, Att'y for moving defendants.

64 The said motions, and each and all of them, were argued and submitted to the court, and were sustained on the ground that the court had no jurisdiction of the said cause, and a decree made and entered herein dismissing the bill herein on the said ground.

It is further certified that the matter in controversy herein as shown by the said bill exceeds the sum or value of $3,000, exclusive of interest and costs.

Dated this 26 day of July, 1915.

FRANK H. RUDKIN,
Judge of the United States District Court for the Eastern District of Washington, Sitting as Judge of the United States District Court for the District of Montana.

Filed July 28, 1915.
GEO. W. SPROULE, *Clerk.*

65 Thereafter, on July 28, 1915, Petition for Appeal and Order Allowing Same were duly filed and entered herein, in the words and figures following, to wit:

66 In the District Court of the United States in and for the District of Montana.

No. 21. In Equity.

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, a Corporation, and Anaconda Copper Mining Company, a Corporation, Complainants,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, Johanna Farlin, A. F. Bushnell, Patrick Leroux, J. T. Fitzgerald, Elizabeth Brown, C. B. Nolan, W. D. Thornton, Nancy Hobbs, Lou H. Hadwick, Annie Stalker, M. F. Cleary, E. J. Cleary, Adolph Keppler, J. B. Woods, Racheal Merriman, Bertha McGowan and Alice McGowan, Defendants.

Petition for Appeal and Order Allowing the Same.

To the Honorable Frank H. Rudkin, Judge of the United States District Court for the Eastern District of Washington, acting as United States District Judge for the District of Montana:

The above named complainants, Olivia H. Hopkins, Washington-Butte Mining Company, a corporation, and Anaconda Copper Mining Company, a corporation, feeling themselves aggrieved by the

decree made and entered in this cause on the 26th day of July, 1915, do hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and they pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record and proceedings and papers upon which said decree was based duly authenticated may be sent to the Supreme Court of the United States, and your petitioners further pray that the proper order touching the security to be required of them to perfect their appeal, be made.

H. C. HOPKINS,
Solicitor for Complainant, Olivia H. Hopkins.

67 J. L. TEMPLEMAN,
JOHN A. SHELTON,
Solicitors for Complainant, Washington-Butte Mining Company.
L. O. EVANS,
W. B. RODGERS,
D. GAY STIVERS AND
D. M. KELLY,
Solicitors for Complainant, Anaconda Copper Mining Company.

The above and foregoing petition is granted and the appeal allowed upon giving a bond conditioned as required by law in the sum of $500.00.

Dated this 26th day of July, 1915.

FRANK H. RUDKIN,
Judge of the United States District Court for the Eastern District of Washington, Sitting as Judge of the United States District Court for the District of Montana.

Filed & entered July 28, 1915.

GEO. W. SPROULE, *Clerk.*

68 Thereafter, on July 28, 1915, Bond on Appeal, duly approved, was filed herein, in the words and figures following, to wit:

69 In the District Court of the United States in and for the District of Montana.

No. 21. In Equity.

OLIVIA H. HOPKINS, Washington-Butte Mining Company, a Corporation, and Anaconda Copper Mining Company, a Corporation, Complainants,

vs.

FRANK WALKER, CLINTON J. CLARK, LOUIS MASON, L. O. CLARK, Johanna Farlin, A. F. Bushnell, Patrick Leroux, J. T. Fitzgerald, Elizabeth Brown, C. B. Nolan, W. D. Thornton, Nancy Hobbs, Lou H. Hadwick, Annie Stalker, M. F. Cleary, E. J. Cleary, Adolph Keppler, J. B. Woods, Racheal Merriman, Bertha McGowan and Alice McGowan, Defendants.

Bond on Appeal.

Know all men by these presents; That we, Olivia H. Hopkins, Washington-Butte Mining Company, a corporation, and Anaconda Copper Mining Company, a corporation, as principals, and American Surety Co. of New York, a corporation, duly organized and existing under and by virtue of the laws of the State of New York, and duly licensed and authorized to furnish bonds in judicial proceedings in the State of Montana, are held and firmly bound unto the defendants above named, in the penal sum of Five Hundred ($500) Dollars, for the payment of which sum well and truly to be made, we bind ourselves, our successors and assigns jointly and severally firmly by these presents.

The condition of the foregoing obligation is such, that

Whereas, the above named complainants have or are about to appeal to the Supreme Court of the United States to reverse the judgment in the above entitled cause by the said District Court of the United States, for the District of Montana;

Now, therefore, if the above named complainants Olivia H. Hopkins, Washington-Butte Mining Company, a corporation,
70 and Anaconda Copper Mining Company, a corporation, shall prosecute such appeal to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation to be void, otherwise to be and remain in full force and effect.

In testimony whereof, the said Olivia H. Hopkins has hereunto signed her name, and the other parties hereto have caused their

corporate names to be signed hereto and their corporate seals to be hereunto affixed, at Butte, Montana, this 20th day of July, 1915.

OLIVIA H. HOPKINS,
WASHINGTON-BUTTE MINING COMPANY,
[CORPORATE SEAL.] By E. S. SHIELDS, *Secretary*,
[CORPORATE SEAL.] ANACONDA COPPER MINING CO.,
By J. T. ROBERTS, *As Asst. Secretary*,
Principals.
AMERICAN SURETY COMPANY OF NEW YORK, [SEAL.]
By L. A. KING, *Resident Vice President*,

Attest:

LEWIS A. SMITH,
Resident Assistant Secretary, Surety.

Order Approving Bond.

The above and foregoing bond on appeal is hereby approved this 26 day of July, 1915.

FRANK H. RUDKIN,
Judge of the United States District Court for the Eastern District of Washington, Sitting as Judge of the United States District Court for the District of Montana.

Filed July 28, 1915.
GEO. W. SPROULE, *Clerk.*

71 Thereafter, on August 7, 1915, a Citation duly issued on July 26, 1915, and served, was returned and filed herein, which said Citation is hereto annexed and is in the words and figures following, to wit:

72 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Frank Walker, Clinton C. Clark, Louis Mason, L. O. Clark, Johanna Farlin, A. F. Bushnell, Patrick Leroux, J. T. Fitzgerald, Elizabeth Brown, C. B. Nolan, W. D. Thornton, Nancy Hobbs, Lou H. Hadwick, Annie Stalker, M. F. Cleary, E. J. Cleary, Adolph Keppler, J. B. Woods, Racheal Merriman, Bertha McGowan, and Alice McGowan, Greeting:

You, and each of you, are hereby cited and admonished to be and appear in the Supreme Court of the United States, to be held at the City of Washington, within sixty days from the date of this writ, pursuant to an order allowing such appeal filed in the office of the

Clerk of the District Court of the United States, for the District of Montana, in a suit wherein Olivia H. Hopkins, Washington-Butte Mining Company, a corporation, and Anaconda Copper Mining Company, a corporation, are complainants, and Frank Walker, Clinton C. Clark, Louis Mason, L. O. Clark, Johanna Farlin, A. F. Bushnell, Patrick Leroux, J. T. Fitzgerald, Elizabeth Brown, C. B. Nolan, W. D. Thornton, Nancy Hobbs, Lou H. Hadwick, Annie Stalker, M. F. Cleary, E. J. Cleary, Adolph Keppler, J. B. Woods, Racheal Merriman, Bertha McGowan and Alice McGowan, are defendants, then and there to show cause, if any there be, why the decree rendered herein against the said complainants as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 26 day of July, in the Year of our Lord, One Thousand Nine Hundred Fifteen.

FRANK H. RUDKIN,
Judge of the United States District Court for the Eastern District of Washington, Sitting as Judge of the United States District Court for the District of Montana.

73 Due service of the above and foregoing citation, by copy thereof, admitted this 30th day of July, 1915.

JAMES T. FITZGERALD,
Solicitors for Defendants Frank Walker, Clinton C. Clark, Louis Mason, L. O. Clark, Johanna Farlin, J. T. Fitzgerald, C. B. Nolan, Racheal Merriman, M. F. Cleary, E. J. Cleary, Adolph Keppler, and J. B. Woods.
FRED J. FURMAN,
A. J. VERHEYEN,
Solicitors for Defendants Lou H. Hadwick and Elizabeth Brown.
——— ———,
Solicitor for Defendant Nancy Hobbs.
LOUIS E. HAVEN,
Guardian ad Litem for Defendants Bertha McGowan and Alice McGowan.
A. F. BUSHNELL,
ANNIE STALKER,
Defendants.

74 Due service of the citation issued herein on the 30th day of July, 1915, by copy thereof, is hereby admitted this 3rd day of August, 1915.

NANCY HOBBS,
Defendant.

75 Due and sufficient service of the Citation issued herein on the 30th day of July, 1915, by copy thereof, admitted this 3rd day of August, 1915.

W. D. THORNTON,
Defendant.

76 [Endorsed:] No. 21. Citation. Filed August 7 1915. Geo. W. Sproule, Clerk, by Harry H. Walker, Deputy Clerk.

77 Thereafter, on August 16, 1915, the plaintiffs filed their Præcipe for Transcript on Appeal herein, in the words and figures following, to wit:

78 In the District Court of the United States in and for the District of Montana.

No. 21. (In Equity.)

OLIVIA H. HOPKINS, WASHINGTON BUTTE MINING COMPANY, a Corporation, and Anaconda Copper Mining Company, a Corporation, Complainants,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, Johanna Farlin, A. F. Bushnell, Patrick Leroux, J. T. Fitzgerald, Elizabeth Brown, C. B. Nolan, W. D. Thornton, Nancy Hobbs, Lou H. Hadwick, Annie Stalker, M. F. Cleary, E. J. Cleary, Adolph Keppler, J. B. Woods, Racheal Merriman, Bertha McGowan, and Alice McGowan, Defendants.

Præcipe to the Clerk for Preparation of Transcript on Appeal.

To George W. Sproule, Clerk of the United States District Court in and for the District of Montana:

You will please prepare transcript on appeal herein and include therein the following papers, to-wit:

1. Opinion filed July 10, 1915.
2. Decree.
3. Assignment of errors.
4. Certificate of question of jurisdiction.
5. Petition for appeal and order allowing the same.
6. Bond on appeal and order approving same.
7. Citation.

Dated this 10th day of August, 1915.

H. C. HOPKINS,
Solicitor for Complainant Olivia H. Hopkins.
L. O. EVANS,
W. B. RODGERS,
D. GAY STIVERS AND
D. M. KELLY,
Solicitors for Complainant Anaconda Copper Mining Co.

79 J. L. TEMPLEMAN AND
JOHN A. SHELTON,
Solicitors for Complainant Washington-Butte Mining Co.

Due service of the above and foregoing præcipe admitted this 14th day of August, 1915, and the right to file a præcipe herein indicating additional portions of the record to be included in the said transcript is hereby waived, and consent is given that the said transcript may be immediately prepared containing only the portions of the said record indicated in the above and foregoing præcipe.

——— ———,
JAMES T. FITZGERALD,
Solicitors for Defendants Frank Walker, Clinton C. Clark, Louis Mason, L. O. Clark, Johanna Farlin, J. T. Fitzgerald, C. B. Nolan, Racheal Merriman, M. F. Cleary, E. J. Cleary, Adolph Keppler, and J. B. Woods.
A. F. BUSHNELL, *Defendant.*
——— ———,
——— ———,
Solicitors for Defendants Lou H. Hadwick and Elizabeth Brown.
LOUIS E. HAVEN,
Solicitor and Guardian ad Litem for Defendants Bertha McGowan and Alice McGowan.

80 STATE OF MONTANA,
County of Silver Bow, ss:

Lillian Kaukola, being first duly sworn deposes and says; that she served the above and foregoing præcipe upon the following named defendants on the 14th day of August, 1915, by depositing for each of said defendants a true copy thereof enclosed in a wrapper, postage prepaid, addressed to each of said defendants, or his or her attorney, as hereinafter stated, in a U. S. Postoffice Box at Butte, Montana, to-wit: On the defendant W. D. Thornton, addressed W. D. Thornton, Esq., 42 Broadway, room 227, New York City, New York; Annie Stalker, addressed Annie Stalker, St. John, Stafford County, Kansas; Nancy Hobbs, addressed to E. H. Powers, Esq., attorney at law, Jacksboro, Campbell County, Tennessee; Lou H. Hadwick and Elizabeth Brown, addressed to Fred J. Furman, attorney at law, Clark Block, Butte, Montana.

LILLIAN KAUKOLA.

Subscribed and sworn to before me this 14th day of August, 1915.
[SEAL.] A. A. GRORUD,
Notary Public in and for the State of Montana, Residing at Butte, Montana.

My commission expires Nov. 19, 1916.

STATE OF MONTANA,
County of Silver Bow, ss:

John A. Shelton, being first duly sworn, deposes and says; that he served a true copy of the above and foregoing præcipe on Fred J. Furman and A. J. Verheyen, solicitors for defendants Lou H.

Hadwick and Elizabeth Brown, on the 14th day of August, 1915, at two o'clock P. M. of said day, by depositing a true copy of the same in a conspicuous place in their office, at Butte, Montana, to-wit—in front of the entrance door of said office, they being absent from the said office at the said time and no person being in charge thereof.

JOHN A. SHELTON.

Subscribed and sworn to before me this 14th day of August, 1915.

[SEAL.] A. A. GRORUD,
Notary Public in and for the State of Montana,
Residing at Butte, Montana.

My commission expires Nov. 19, 1916.

Filed Aug. 16, 1915.
GEO. W. SPROULE, *Clerk.*

81 *Clerk's Certificate to Transcript of Record.*

UNITED STATES OF AMERICA,
District of Montana, ss:

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the Supreme Court of the United States, that the foregoing volume of 80 pages, numbered consecutively from 1 to 80, inclusive, is a full, true, correct and compared transcript of the original Opinion, Decree, Assignment of Errors, Certificate of Question of Jurisdiction, Petition for Appeal and Order Allowing Same, Bond on Appeal, and Præcipe for Transcript on Appeal, mentioned in said præcipe for transcript, as appears from the original records and files of said court in my possession as such Clerk; and I further certify and return that I have annexed to said transcript and included within said paging the original Citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Thirteen 85/100 Dollars ($13.85) and have been paid by the appellants.

Witness my hand and the seal of said Court at Helena, Montana, this 24th day of August, A. D. 1915.

[Seal United States District Court, District of Montana, 1890.]

GEO. W. SPROULE, *Clerk,*
By C. R. GARLOW,
Deputy Clerk.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 8/24/1915. C. R. G.]

Endorsed on cover: File No. 24,900. Montana D. C. U. S. Term No. 617. Olivia H. Hopkins, Washington-Butte Mining Company, and Anaconda Copper Mining Company, appellants, vs. Frank Walker, Clinton C. Clark, Louis Mason et al. Filed August 31st, 1915. File No. 24,900.

MOTION AND NOTICE OF MOTION TO ADVANCE AND TO SUBMIT

Office Supreme Court, U. S.
FILED
SEP 30 1915
JAMES D. MAHER
CLERK

IN THE SUPREME COURT OF THE UNITED STATES,

No. [redacted]234 October Term, 191[redacted]

File No. 24,900.

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, a Corporation, and ANACONDA COPPER MINING COMPANY, a Corporation,

Appellants,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, JOHANNA FARLIN, A. F. BUSHNELL, PATRICK LEROUX, J. T. FITZGERALD, ELIZABETH BROWN, C. B. NOLAN, W. D. THORNTON, NANCY HOBBS, LOU H. HADWICK, ANNIE STALKER, M. F. CLEARY, E. J. CLEARY, ADOLPH KEPPLER, J. B. WOODS, RACHAEL MERRIMAN, BERTHA McGOWAN and ALICE McGOWAN.

Appellees.

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1915.

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, a Corporation, and ANACONDA COPPER MINING COMPANY, a Corporation,

Appellants,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, JOHANNA FARLIN, A. F. BUSHNELL, PATRICK LEROUX, J. T. FITZGERALD, ELIZABETH BROWN, C. B. NOLAN, W. D. THORNTON, NANCY HOBBS, LOU H. HADWICK, ANNIE STALKER, M. F. CLEARY, E. J. CLEARY, ADOLPH KEPPLER, J. B. WOODS, RACHAEL MERRIMAN, BERTHA McGOWAN and ALICE McGOWAN.

Appellees.

MOTION AND NOTICE OF MOTION TO ADVANCE AND TO SUBMIT.

Come now the appellants herein and in pursuance of Rule 32 of this court move the court that the above entitled cause be advanced for hearing, and when so advanced that the same be submitted to the court for decision.

This motion is made on the ground that this cause was brought into this court by appeal from the District Court of the United States, for the District of Montana, under the provisions of Section 238, Act of March 3, 1911, Chapter 231, and the only question in issue is the question of juris-

diction of the court below, a decree having been rendered in the said court dismissing the said cause for an alleged lack of jurisdiction and the question of jurisdiction only having been certified to this court for its decision.

H. C. HOPKINS and
JOHN A. SHELTON,
Solicitors for Appellant,
Olivia H. Hopkins.

L. O. EVANS,
W. B. RODGERS,
D. GAY STIVERS,
D. M. KELLY,
Solicitors for Appellant,
Anaconda Copper Mining Co.

J. L. TEMPLEMAN,
JOHN A. SHELTON,
Solicitors for Appellant,
Washington-Butte Mining Co.

To the Appellees, and to Messrs. T. J. Walsh, C. B. Nolan, J. T. Fitzgerald, Fred J. Furman, A. J. Verheyen, and Louis E. Haven, their solicitors:

You, and each of you, will please take notice that the above and foregoing motion will be submitted to the court, at the courtroom thereof, on Monday, the 18th day of October, 1915, at the hour of the opening of court on said day, or as soon thereafter as the matter can be heard.

H. C. HOPKINS and
JOHN A. SHELTON,
Solicitors for Appellant,
Olivia H. Hopkins,

L. O. EVANS,
W. B. RODGERS,
D. GAY STIVERS,
D. M. KELLY,
Solicitors for Appellant,
Anaconda Copper Mining Co.

J. L. TEMPLEMAN,
JOHN A. SHELTON,
Solicitors for Appellant,
Washington-Butte Mining Co.

SEP 30 1915
JAMES D. MAHER
CLERK

BRIEF OF APPELLANTS.

File No. 24,900.

SUPREME COURT OF THE UNITED STATES.

No. [redacted] 234 October Term, 1915.

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, a Corporation, and ANACONDA COPPER MINING COMPANY, a Corporation, Appellants,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, JOHANNA FARLIN, A. F. BUSHNELL, PATRICK LEROUX, J. T. FITZGERALD, ELIZABETH BROWN, C. B. NOLAN, W. D. THORNTON, NANCY HOBBS, LOU H. HADWICK, ANNIE STALKER, M. F. CLEARY, E. J. CLEARY, ADOLPH KEPPLER, J. B. WOODS, RACHEL MERRIMAN, BERTHA McGOWAN and ALICE McGOWAN, Appellees.

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File No. 24,900.

SUPREME COURT OF THE UNITED STATES.

No. 617. October Term, 1915.

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, a Corporation, and ANACONDA COPPER MINING COMPANY, a Corporation, Appellants,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, JOHANNA FARLIN, A. F. BUSHNELL, PATRICK LEROUX, J. T. FITZGERALD, ELIZABETH BROWN, C. B. NOLAN, W. D. THORNTON, NANCY HOBBS, LOU H. HADWICK, ANNIE STALKER, M. F. CLEARY, E. J. CLEARY, ADOLPH KEPPLER, J. B. WOODS, RACHEL MERRIMAN, BERTHA McGOWAN and ALICE McGOWAN, Appellees.

STATEMENT OF THE CASE.

This suit was begun by the appellants, as complainants, filing their bill in the United States District Court, for the District of Montana. The purpose of the suit is to remove certain clouds from title of the complainants as to certain land, the same being a portion of the Butte & Boston Placer Mining Claim, Survey No. 3379, which said land is particularly described and is situated in Silver Bow County, Montana. The bill, besides alleging the existence of the jurisdictional amount in controversy, and the corporate existence of two of the complainants, alleges that the complainants are the owners, and in possession of the said land, and that they, and their predecessors in interest had been, continuously, for more than twenty years immediately preceding the commencement of the action, in possession of the said land; that the title of the complainants was based upon undisputed evidence, to-wit: A patent from the United States of America; that the predecessors in interest

of the complainants derived their title as to such land from a patent from the United States of America, a copy of the patent being annexed to the bill marked Exhibit "A," and made a part thereof, from which patent it appears that it was dated December 19, 1895; that the same was for a placer mining claim, and was based upon the location of such ground as such, and contained a reservation of any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits known to exist on the date of the application for such patent; that upon certain dates specified, the earliest being June 2, 1900, and the latest being January 14, 1913, nine different declaratory statements of location, or certificates of location of lode mining claims were filed for record and were recorded in the Office of the County Clerk and Recorder of Silver Bow County, Montana, in certain specified volumes and pages, and that they there so remained of record at the date of the filing of the bill. The said paper writings, by copy thereof, marked respectively Exhibits "B" to "J," inclusive, are annexed to, and made a part of the bill, and from them it appears that each of them, upon its face appears to be valid; that each of them recites that within the boundaries thereof discovery had been made of a lode bearing silver, copper and other valuable deposits of mineral; that each of them gives notice of the location by certain locators of a lode mining claim embracing a piece of ground 1500 feet in length extending along the vein or lode located, and having a width of 300 feet on each side from the middle or center of the said lode, and that the earliest of such locations was made on the 19th day of March, 1900, and that the latest of such locations was made on the 20th day of November, 1912.

The bill further alleges that the land embraced within the exterior boundaries of such locations is either wholly or partly the land alleged to be owned by the complainants.

The bill further alleges:

> "That the land herein described is embraced within the exterior boundaries of two lode locations made or attempted to be made prior to the date of the location of the said Butte & Boson placer, which lode locations were known respectively as Point Pleasant Lode claim and Pleasant View Lode claim; that said last named lode claims if valid in the beginning continued in

force (except for the proceedings hereinafter set forth) to and including the date of the issuance of said patent; that the said Point Pleasant and Pleasant View Lode claimants filed in the United States Land Office at Helena, Montana, in due time two adverse claims to the said application for patent for the said Butte & Boston Placer, which said adverse claims were in due form of law and were filed during the period of publication of notice of said application for patent and in the same said Point Pleasant and Pleasant View lode claimants by reason of said Point Pleasant and Pleasant View Lode claims asserted adversely to said applicants a claim of right to the possession of so much of the land embraced in said application for patent as was in conflict with said lode claims and within thirty days after the filing of said adverse claims, said adverse claimants with respect to each of said adverse claims, filed against said applicants in the Second Judicial District Court of the State of Montana a complaint in due form of law to determine the right of possession as to the land embraced in said adverse claims; said applicants filed answer in each of said suits, which suits were regularly heard and determined and a decision and judgment duly given and made in each of them in favor of the defendants therein and the judgment roll in each of said suits duly certified was filed in the said United States Land Office, together with the requisite description and certificate of the Surveyor General, whereupon said proceedings and judgment rolls being certified to the Commissioner of the General Land Office, and on payment of the purchase price for the land said patent was issued in conformity with said judgments; that the said defendants and each of them claim that the said patent was to the extent of the land embraced in said Point Pleasant and Pleasant View lode claims wholly invalid and that it was rendered so invalid because of the existence and continuance in force of said claims at the date of issuance of said patent and if not so invalid that the said land herein particularly described and all of the same with any and all lodes, veins and deposits of mineral therein contained was, because of the known existence by said applicants for

patent at the date of said application, within said described land of certain veins and lodes, reserved and excepted from the said patent and that the title thereto remained in the United States of America until so located or attempted to be located by the said defendants or their predecessors in interest and said defendants further claim that the lode location of any of the said lodes and veins within the said ground and by them so claimed to be subject to location may embrace an area of surface ground having a length and breadth of 1500 feet and 600 feet respectively, and all of the said pretended lode locations are so made as to embrace an area of surface ground of that extent * * * "

"That no vein or lode within the meaning of the terms as used in Section 2333 of the Revised Statutes of the United States was known at the date of said application to exist within said Butte & Boston Placer Mining Claim; that if any veins or lodes had been so reserved or excepted or if such patent as to the same was invalid, a lode location of any one of them could not embrace an area of enclosing surface ground exceeding 25 feet on each side of the center of the vein or lode located and could not embrace any portion of such vein or lode not actually uncovered and exposed to view at or prior to the date of said application for patent and on said date there had been no opening made in said ground beneath the surface of bedrock and no exposure of the surface of bedrock of a greater extent than ten feet in any one direction * * * "

"Said pretended lode claims are and each of them is entirely invalid and the said declaratory statements of location and certificates of location, so of record, are and each of them is invalid and constitute and each of them constitutes a cloud upon the title of the complainants in and to the said premises and every part thereof, and reduce the market value thereof. * * * "

The prayer of the bill is that the cloud caused by the recording of the said declaratory statements of location, and certificates of location, and each and all of them, be removed, and the same decreed to be no cloud upon the title of the complainants in and to the said premises, and

that the title of the complainants therein be quieted, and for such other relief in the premises as equity and good conscience may require. (T. 9 to 33.)

Certain of the defendants filed motions to dismiss upon the ground that the court was without jurisdiction (T. 34 to 38), which said motions were sustained, an opinion filed, and an order made for a decree dismissing the bill for an alleged lack of jurisdiction (T. 2 to 5), and a decree was made and entered dismissing the suit upon that ground (T. 6), from which decree this appeal is prosecuted.

At the time of the commencement of this suit, and long prior thereto, there was in force in Montana Sections 6115, 6116 and 6870 of the Revised Codes of Montana of 1907, which sections are as follows:

> "6115. A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled."
>
> "6116. An instrument, the invalidity of which is apparent upon its face, or upon the face of another instrument which is necessary to the use of the former in evidence, is not to be deemed capable of causing injury within the provisions of the last section."
>
> "6870. An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

Prior to the date of the commencement of this suit, to-wit: March 28th, 1914, the said Section 6115 and 6116 had been construed by the Supreme Court of the State of Montana in the case of:

Hicks vs. Rupp, 49 Mont. 40; 140 Pac. 97.

in the opinion in which case the court, concerning the said sections, said:

> "We inquire first, then, whether the facts stated justify the equitable relief demanded. A suit to have canceled and declared void an instrument which constitutes a cloud upon the title of plaintiff is referable to the general jurisdiction which courts of equity ex-

ercise upon the principle of quia timet. Arnold v. Fraser, 43 Mont. 540, 117 Pac. 1064; Fratt v. Daniels-Jones Co., 47 Mont. 487, 133 Pac. 700; Story's Equity Jurisprudence (10th Ed) Sec. 701; 2 Pomeroy's Equitable Remedies, 685; 6 Cyc. 286. In the Revised Codes are found these sections:"

Then follows a copy of said Section 6115 and 6116, and then continuing, the court further said:

"These provisions, taken together, clearly define the rule, with its limitations, under which the equitable jurisdiction of the court may be invoked. The instrument in question must be in writing and must be of such a character that, if left outstanding, it will menace with injury the person against whom it is void or voidable; hence, if its invalidity appears directly or constructively upon its face, the court may not interfere.

"Clearly, also, if it does not appear, either from the instrument itself or the statement of facts explaining its character, that, if left outstanding, it will or may result in injury, the court ought not to interfere. In other words, a case must be stated which falls within the rule. Castro v. Barry, 79 Cal. 443, 21 Pac. 946; Hibernia S. & L. Soc. v. Ordway, 38 Cal. 681; 6 Cyc. 324. In Hibernia S. & L. Soc. v. Ordway, it was said: 'In an action to remove a cloud there can be no question but that the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, ought to be stated. To merely name the instrument, therefore, might not ordinarily be sufficient.' In order to invoke the jurisdiction, therefore, the complaint must disclose the facts necessary to show that, but for the interposition of the court, the plaintiff may suffer injury.

"The complaint here fails to disclose that the contract is of such a character that, if it remains outstanding, it will be a menace to plaintiffs' title, or probably imperil it in any way."

This appeal involves the following questions:

First—Was the United States District Court, for the District of Montana, by the passage of the said Section

6870 by the Legislature of Montana, deprived of the power to entertain jurisdiction in suits to remove a cloud from the title of land situated in Montana, the facts necessary to maintain such suit prior to the passage of such statute being alleged?

Second—If not, is it necessary, in such a suit, to allege the facts showing the actual invalidity of the paper writings, the cloud cast by which, the complainants seek to have removed? and

Third—In such a suit, is it necessary to allege the facts by way of explanation of the character of such paper writing which show that if such paper writing be left outstanding it will menace complainants with injury.

Fourth—Do the rules of pleading in equity cases require that a former adjudication relied upon as an absolute bar appearing on the face of the record shall be pleaded in order that it may be available?

Fifth—If questions two, three and four, or any of them, are answered in the affirmative, then are the allegations in the bill in this case sufficient to show that the case involves in its decision the construction of a statute of the United States?

All of which questions are embraced in question——

Sixth—Did the lower court have jurisdiction?

SPECIFICATION OF ERRORS.

Appellants allege that the decree which dismissed the suit because of an alleged lack of jurisdiction is erroneous. They assign as error:

First—The trial court erred in sustaining the motions of the appellants to dismiss the bill herein on the ground that the trial court had not jurisdiction of the said cause.

Second—The trial court erred in holding that it had no jurisdiction of the said cause and in dismissing the bill herein.

Third—The trial court erred in entering a decree of dismissal herein and in adjudging and decreeing that the said bill be dismissed.

BRIEF OF ARGUMENT.

The foregoing questions will be taken up in the order stated.

I.

HAS THE PASSAGE OF THE SAID SECTION 6870 HAD THE EFFECT OF DEPRIVING THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF MONTANA, OF POWER TO ENTERTAIN JURISDICTION OF SUITS TO REMOVE CLOUDS FROM THE TITLE OF LAND SITUATED IN MONTANA?

The learned judge of the court below held that the suit is one to quiet title. We do not understand from the decision rendered, that it was his opinion that the facts alleged were not sufficient to state a cause of suit for the removal of a cloud before the passage of the said Section 6870, or that anything was stated beyond that which was necessary in such statement. The allegations in the bill that the complainants are the owners of the land in question, and that the defendants claim an interest therein adversely to the complainants by virtue of certain mining locations of record in Silver Bow County, Montana, are, of course, a part of the statement of the facts necessary to constitute a cause of suit for the removal of a cloud. If we look beyond the allegations of fact and consider the prayer there is nothing to indicate any intention to proceed under the said Section 6870. In suits under the same and similar statutes, the prayer usually is that the defendant be required to set forth his claim or interest that it may be adjudged by the court. In the present case the prayer is that the cloud cast by certain paper writings of record be removed. To that is added a prayer that the title of the complainants be quieted. That, however, is a prayer that such title be quieted as against the claims asserted by reason of the locations complained of, and is merely another way of asking that the cloud be removed.

The decision of the lower court in effect is that since the passage of the said Section 6870, suit cannot, in Montana, be maintained to remove a cloud merely, but that suit, under the said Section 6870 may be maintained in

cases where before its passage a suit could have been maintained for the removal of a cloud, and that, therefore, a suit to remove a cloud is necessarily a suit under the said Section 6870, and that in such suits it is not necessary to allege the nature of the adverse claim asserted by the defendants, and he might have added that in a suit under such a statute neither is it necessary to allege the facts which show the actual invalidity of the instrument of record which casts a cloud upon the title of the complainant, or to allege in general terms that such instrument is invalid, or to allege facts to show that the complainants are menaced with injury. It is therefore clear that if a suit may be maintained to remove a cloud, the same facts being alleged which were necessary before the passage of the said statute, Section 6870, then the position taken by the lower court is erroneous.

The precise question has many times been before the courts for decision. Excepting for the decision of the lower court in this case it has never been held that statutes similar to the said Section 6870 had such effect.

It has been many times held by this court that in suits in equity, as well as in actions at law, it will follow the construction placed on a state statute by the court of last resort of such state.

> Forsyth v. Hammond, 166 U. S. 506;
> Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685.

In view of such decisions, and the decision in Hicks v. Rupp, supra, how can the statement of the trial court that "the distinction between suits to quiet title and suits to remove a cloud under modern statutory enactments have little more than an historical interest" be sustained? The effect of such decision by the Montana Supreme Court is the same in effect as though there were added to said Section 6870 another section, as follows:

> "A suit to have cancelled and declared void an instrument which constitutes a cloud upon the title of the plaintiff may be maintained in a court of equity under the general jurisdiction which such courts exercise upon the principle quia timet. In such a suit the plaintiff shall state in his complaint the facts which show the invalidity of the instrument which is complained of as

constituting the cloud, and which is apparently valid, and in order that the suit may be maintained it must appear from the allegations of fact in the complaint that if such instrument be left outstanding it will, or may result in injury to the plaintiff."

What is said by the Supreme Court of Montana affects only the right to maintain a suit to remove a cloud in the Montana State Courts, but if the passage of the said Section 6870 did not affect such right, it, of course, could not by any possibility be construed as affecting the right to maintain such a suit in a Federal Court. If, however, the said Section 6870 had the effect of depriving a suitor of the right to maintain a suit to remove a cloud in the Montana State Courts it could in no way abridge the powers of courts of equity of the United States, although in the Federal Courts any enlargement of equitable rights by a state statute will be recognized;

Frost v. Spitley, 121 U. S. 552; 30 L. ed. 1010.

The rule is stated in

Railroad Company v. Slocum, 77 Fed. 345, and Meyers v. Shields, 61 Fed. 713

to the effect that the Federal Courts in administering equitable relief are not bound by any restrictions of the local law, but may have the benefit of any enlargement of equitable rights by a state.

The power to grant relief in certain cases by perpetually enjoining the assertion of any claim to the title, and to remove clouds from the title to real property, is inherent in courts of chancery.

Holland vs. Challen, 110 U. S. 15; 28 L.ed. 52.

The equity jurisdiction conferred on the Federal Courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union. Bills to remove a fraudulent judgment as a cloud upon the title of the debtor are within the jurisdiction of equity.

Mississippi Mills v. Cohn, 150 U. S. 202; 37 L. ed. 1052.

This court in the case of

Barber v. Barber, 21 How. 582; 16 L. ed. 226,

concerning the power of the states to abridge the powers of the Courts of Equity of the United States, said:

> "It is no objection to equity jurisdiction in the courts of the United States that there is a remedy under the local laws; for the equity jurisdiction of the Federal Courts is the same in all the states, and is not affected by the existence or non-existence of an equity jurisdiction in the state tribunal."

The power of the Federal Courts of Equity to remove a cloud, under certain circumstances, is recognized by the Federal Statutes.

> Act March 3, 1911, Chap. 231, Sec. 57
> (Federal Statutes Annotated, 1 Supplement 1912, 115.)

In the courts of other states having a statute similar to the said Section 6870, it has been uniformly held that the right to maintain a suit to remove a cloud remains unaffected.

In the state of New York a statute similar to our Section 6870 was passed. It was held by the Supreme Court of that state after the passage of that statute that suit might be brought to remove a cloud from title under the same circumstances, and by alleging the same facts precisely as were required prior to the passage of such statute.

From the opinion of the court in

Meyer v. Wilcox, 136 N. Y. S. 337

we quote the following:

> "The relief against a cloud on a title by a suit in equity to remove it was not merged in the statutory action for the determination of claims to real property provided by Code Civ. Proc. Par. 1638 et seq; and hence the complaint in such suit need not comply with the requirements prescribed by the Code relating to complaints in the statutory action."
>
> "While the relief obtainable in an action in equity to remove a cloud from a title is very similar to that obtainable in a statutory action under Code Civ. Proc.

> Par. 1638 et seq; the court in the equitable action possess all the powers possessed by the Court of Chancery prior to the adoption of the Code of Procedure in 1848."

The Supreme Court of West Virginia, under like circumstances, declared that courts of equity of that state had the same powers after the passage of a similar statute that they had previously, to remove a cloud from title, the bill containing the necessary allegations for such relief. The language employed on this point by the court in its opinion in

Bank v. Elkins, 51 So. 821

is as follows:

> "Independent of our statute for the quieting of titles and the determination of claims to real estate (Code, Par. 5443 et seq.) courts of equity have jurisdiction to cancel and remove a *specifically described* cloud upon the complainant's title, when the owner is in possession, and when the evidence of the alleged cloud is not void on its face, and extrinsic evidence is necessary to show its invalidity."

The italics are ours.

From

Wiard v. Brown, 59 Cal. 194

we quote as follows:

> "Wherever an instrument of writing exists, which has been obtained without consideration, or has become a nullity, or which, if left outstanding, may cause injury to a plaintiff, or may be vexatiously used against him, after the evidence to impeach or invalidate it is lost or may throw a cloud or suspicion over his title, a court of equity will afford relief by ordering it to be delivered up and cancelled. (Sec. 3412, C. C.; 2 Story's Eq., Sec. 705.)"

Section 3412 of the Civil Code, and Section 738 of the Code of Civil Procedure, of California, are the same, respectively, as said Sections 6115, and 6870. In the quotation above, the citation in support of the same proposition of Section 3412 of the Civil Code of California, and 2

Story's Equity, Section 705, indicates that actions maintainable under the said section, and those maintainable prior to the passage of the statute under the equity practice to remove clouds are of the same character.

The trial court in rendering decision evidently went upon the theory that as the relief granted in a suit to remove a cloud and that granted in a statutory suit to determine an adverse claim are of the same character, no distinction can be made between the two kinds of suits. We may concede for the purpose of argument that there is no substantial difference between a decree removing a cloud cast by an instrument of record under which the defendant claims, and a decree quieting the title of the complainant merely as to the claims of the defendant made under such instrument. The two kinds of suits, however, are nevertheless essentially different, not only in the extent of the relief granted, but also in the necessary allegations of the complaint, and therefore, also, of course, in the proof required on the part of the complainant. In the statutory action to determine an adverse claim it is only necessary to allege that the plaintiff is the owner of the land, describing it, and that the defendant asserts some claim of title or interest therein adverse to him. It is not necessary to allege that the claim of the defendant is invalid, or any facts showing its invalidity,

Rausch v. Trustees, 8 N. E. 25.
17 Encyc. Pl. Pr. 339.
Walton v. Perkins, 10 N. W. 424,

while in a suit to remove a cloud it is necessary to allege ownership of the real property in question by the complainant, that a claim of title appearing in some legal form is of record, with a statement of facts in description of such claim sufficient to show that if such instrument is not cancelled that there is reasonable ground for apprehending that it will cause injury to the complainants, and that the instrument so of record which is apparently valid, is in fact valid.

Hicks v. Rupp, supra.

A decree rendered in a suit to cancel as a cloud a specifically described instrument of record would, of course, not be a bar to the assertion of a claim on the part of the defendant not based upon such instrument.

In

Knudson v. Curley, 15 N. W. 873,

and in

Walton v. Perkins, supra,

it was held that a complaint which is clearly one to remove a specified cloud on title to real estate, cannot, if it fails to allege facts showing that the instrument alleged to be a cloud is in fact invalid, be sustained upon the ground that it states a cause of action under Sections 2 and 3, Chap. 75, General Statutes of Minnesota of 1878, which section is substantially the same as the Montana Statute, said Section 6870.

The complaint in each of those cases was held to be defective as a complaint to remove a cloud, because it failed to state the facts showing the invalidity of the instrument which it was claimed constituted a cloud, the allegation being merely that such instrument was invalid which it was held was the statement of a legal conclusion merely.

From the opinion rendered in Walton v. Perkins, supra, we quote as follows:

> "For if it be conceded that a complaint attempting to set forth a cause of action of one character may be sustained if there be facts enough to show a cause of action of another character, or that if the facts show plaintiff entitled to some relief, though not to any part of that demanded, nor of the character of that demanded, it is good against a demurrer; still it does not follow that where the complaint is clearly intended as a complaint in an ordinary action, it will be sustained against a demurrer merely because, upon some of the facts stated, the plaintiff might bring an action given by statute, special and extraordinary in its nature, and not proceeding according to the usual course of actions. Whether a complaint can be held good on such ground is the question in this case; that is, whether a complaint similar to the old bill in equity to cancel an instrument claimed to operate as a cloud upon real estate may be treated as a complaint in an action under the statute. As the statute has been construed in this state, the action given by it is in some of its features extraordinary, and contrary to the usual course of action. All that the complaint need allege

of defendant is that he claims some estate or interest in or lien on the land, without showing that the claim is invalid, or that defendant does plaintiff any wrong in making it. Steele v. Fish, 2 Minn. 153; Hamilton v. Batlin, 8 Minn. 403."

Concerning the insufficiency of the complaint in Knudson v. Curley, supra, the court in the opinion said:

> "The complainant was not good as one to remove a specific cloud from the title, because it alleges no facts showing that the tax sale or certificate was not valid; the only allegation in that regard being 'that said sale of said land was made without authority of law, and is void.'"

It is altogether clear, we submit, that the passage of said Section 6870 did not have the effect of depriving the United States District Court, for the District of Montana, sitting as a court of equity of any powers which it might have exercised before the passage of such statute, and that a suit to remove a cloud may be maintained by alleging such facts as were necessary before the passage of such statute.

That being so, we inquire:

II. and III.

WHAT ARE THE NECESSARY ALLEGATIONS IN A SUIT TO REMOVE A CLOUD?

A preliminary question is—

WHAT CHARACTER OF PROCEEDING IS SUCH A SUIT?

In Holland v. Challen, supra, this court in the course of the opinion concerning the distinction between suits to quiet title and suits to remove a cloud, said:

> "A bill quina timet or to remove a cloud from the title of real estate differed from a bill of peace in that it did not seek so much to put an end to vexatious litigation respecting the property, as to prevent future litigation by removing existing causes of controversy as to its title. It was brought in view of anticipated

wrongs or mischiefs, and the jurisdiction of the court was invoked because the party feared future injury to his rights and interests."

In

6 Pom. Eq. Jur., Sec. 728

it was said:

"Suits in chancery to quiet title, in the nature of bills of peace, have been defined in the last chapter. The distinction between these and suits to remove a cloud is not always observed. The equitable relief to remove a cloud from title is granted on the principle quia timet; that is, that the deed or other instrument or proceeding constituting the cloud may be used to injuriously or vexatiously embarrass or affect a plaintiff's title."

And from

2 Story Eq. Jur., Sec. 825

we quote the following:

"Now bills in equity quia timet answer precisely to this latter description. They are in the nature of writs of prevention, to accomplish the ends of precautionary justice. They are ordinarily applied to prevent wrongs or anticipated mischiefs, and not merely to redress them when done. The party seeks the aid of a court of equity because he fears (quia timet) some future probable injury to his rights or interests, and not because an injury has already occurred which requires any compensation or other relief."

To the same effect is

1 Abbott's L. Dict. 235,

where it is said:

"The jurisdiction exercised in cases of this kind is founded upon the administration of a protective or preventive justice. Relief is afforded upon the principle of quia timet; that is, that the instruments sought to be canceled may be vexatiously or injuriously used against the rightful owner, when the evidence to impeach them may be lost."

The definition of quia timet found in

Black's L. Dict. 981

is as follows:

> "Because he fears or apprehends. In equity practice, the technical name of a bill filed by a party who seeks the aid of a court of equity, *because he fears* some future probable injury to his rights or interests."

From

17 Encyc. Pl. & Pr. 277 to 279

the following extract is copied—

> "A bill to quiet title, strictly considered, is substantially a bill of peace, and will generally lie only in favor of a person in possession who has already established his title by one or more successful contests at law.
>
> "A bill to remove a cloud is a bill to procure the cancellation, delivery up, or release of an instrument, incumbrance, or claim constituting a cloud on the plaintiff's title, and which may be used to injure or vex the plaintiff in the enjoyment of his title. Such bills will lie without a previous establishment of the plaintiff's title at law, for it may often happen, as where the plaintiff's possession has not been disturbed, that he can maintain no action at law to test the defendant's claim."

As defining that which constitutes a cloud, the following extract is from

Whitney v. Port Huron, 88 Mich., 268; 26 Am. S. Rep. 291:

> "This expression, chiefly used in equity jurisprudence, designates some instrument or proceeding, some deed, mortgage, judgment, decree, assessment, tax, or the like, which apparently, and upon its face, assuming it to be valid, impairs the title of a party to real property, but which, upon extrinsic facts, is void, and ought equitably to be annulled or removed."

NECESSARY ALLEGATIONS IN A BILL TO REMOVE A CLOUD.

We have already referred briefly to this subject in discussing question I., where in support of our contentions as to this point we cited the case of Hicks v. Rupp, supra. In further support of the statements there made as to what facts are necessary to be alleged, we quote from

Welles v. Rhodes, 22 Atl. 286

the following:

> "Under these circumstances, the power to remove a cloud from a title, and to restrain by injunction the prosecution of a suit at law, is not exercised as a matter of course, nor under any universal principle of law requiring its exercise. It is preventive, as we have said, and very much must depend upon the extent and imminence of the danger threatened, and the view which will be taken of the case by a discreet judge."

From

32 Cyc. 1353

we quote the following:

> "In a suit to remove a cloud on title, it must be shown in the bill that such a cloud exists before relief can be given against it, and, in such a case, the bill must, in addition to specifying the writing or matter which constitutes the alleged cloud, state the facts which give it apparent validity, as well as those which show its invalidity."

In

Goldsmith v. Gilliland, 22 Fed. 865

it was said:

> "When a suit is brought to remove a certain cloud from the title of the plaintiff, in the nature of things it must be shown in the bill that there is such a cloud before relief can be given against it. In such a case the bill must, in addition to the writing or matter which constitutes the alleged cloud, state the facts

which give it apparent validity as well as those which tend to show its actual invalidity. Teal v. Collins, 9 Or. 91. But, in a suit brought under section 500 aforesaid, the plaintiff is not required to state the nature or circumstances of the defendant's claim, or to deny knowledge thereof."

The Supreme Court of Oregon in

McLeod v. Lloyd, 71 Pac. 795

says:

"A suit to remove a cloud upon a title is instituted to determine the invalidity of an apparently efficacious instrument, the infirmities of which cannot be ascertained from inspection, but resort must be had for that purpose to extrinsic evidence, to let in which, it is necessary to allege in the complaint the facts constituting such invalidity. Teal v. Collins, 9 Or. 89; Moores v. Clackmas County, 40 Or. 536, 67 Pac. 662. In Shannon v. Portland, 38 Or. 382; 62 Pac. 50, Mr. Justice Wolverton, commenting upon the sufficiency of the allegation and the nature of the proof necessary to sustain a suit of this character, says: "It is essential to the maintenance of such a suit to assert and establish (1) the particular muniment or record constituting the cloud; and (2) the infirmity attending it which renders it a nullity as to the complainant, for, if he does not show it to be a nullity, he must fail of his purpose."

In

Castro v. Barry, 79 Cal. 443

which was an action under the statute to determine an adverse claim it was contended by the appellant that it was necessary to state in the complaint the nature of the defendant's claim. The court overruled that contention, but the reason given for its decision was that the action was one to determine an adverse claim under the statute, on account of which it was to be distinguished from a suit to remove a cloud. It was conceded that in a suit to remove a cloud such allegations as to the claims of the defendant are necessary. In the opinion of the court it was said:

"But in this the learned counsel overlooks the distinction between an action to determine adverse claims, which are provided for by the Code of Civil Procedure, and which in this state are commonly referred to as actions to quiet title, and suits to have an instrument cancelled, or adjudged to be void, which are usually called actions to remove a cloud.

"Suits to have an instrument cancelled, or adjudged to be void, were quite common in the old chancery practice, and constituted one of the applications of the principle quia timet."

And in another part of the opinion the court said:

"The distinction between the two kinds of action is clear. They are different not merely in form (for we have no forms of action in the common law sense), but in purpose. In the former case the proceeding is aimed at a particular instrument, or piece of evidence, which is dangerous to the plaintiff's rights and which may be ordered to be destroyed in whosesoever hands it may happen to be. While in the latter, the proceeding is for the purpose of stopping the mouth of a person who has asserted or is asserting a claim to the plaintiff's property, whether such claim be founded upon evidence or utterly baseless. It is not aimed at a particular piece of evidence, but at the pretensions of an individual."

"The plaintiff *therefore* is not required to set forth *the nature of the defendant's claim.*"

The italics are ours.

The rule that in a suit to remove a cloud it is necessary to particularly describe the claims of the defendants while it is not necessary to do so in a suit to determine an adverse claim under the statute is clearly stated in the case of

Teal v. Collins, 9 Oreg. 89.

The opinion in that case, in part, is as follows:

"A cloud upon title is a title, or incumbrance, apparently valid, but, in fact, invalid. (Bissell v. Kellogg, 60 Barb. 629).

"In such suits it has been held that there can be no

question but that the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, ought to be stated. (Hibernia S. & L. v. Ordway, 58 Cal., 681.

"It is an elementary rule that every fact essential to the plaintiff's title, to maintain the bill and obtain relief, ought to be stated in the bill, otherwise the defect will be fatal." (Story's Eg. Pl., Sec. 257).

"In declaring the requisites of a complaint to remove cloud upon title under a statute somewhat similar to our own, it is said, in Wals v. Grosvenor (31 Wis., 684) that, 'the complaint ought to disclose the nature of the defendant's claim which has a tendency to throw a cloud over the title, and state such facts and circumstances in respect to such claim as show its invalidity, before a court of equity will interfere and and direct it to be released and canceled.'" (Collart v. Fisk, 38 Wis., 243).

"Before suit is brought to remove a cloud upon the title, the plaintiff ought to know there is one, and in what it consists, and state the facts.

"For these reasons we think the complaint is fatally defective in not stating the nature of the defendant's claim, or chain of conveyances, showing in what their invalidity consists. The judgment of the court below is reversed."

One of the points decided in

Chaplin v. Holmes, 27 Ark. 414

is correctly stated in the syllabus as follows:

"The complaint should allege, by way of recital, or otherwise, such facts, under which defendant claims as would give defendant some color of title, or such prima facie evidence of title as to require proof of extraneous facts to avoid them."

From the opinion in

Moores v. Clackamas Co. 67 Pac. 662

we quote as follows:

"We have said, as it respects the manner of instituting the proceeding, that a suit to remove a cloud

and one to quiet title are essentially different. By the former, a plaintiff is required to set up the nature and purpose of defendant's claim or pretended muniment, so far as he is able, following it with the statement of such facts and circumstances regarding it as will indicate its invalidity, and thereby show his right to have it removed as a cloud (Teal v.Collins,9 Or.89); while in the latter it is only necessary for the pleader, after the necessary averments of title and possession, to allege that defendant claims an adverse interest or estate and call upon him to set it forth."

The rule is clearly stated in

Van Zile Eq. Pl. & Pr. Sec. 428,

as follows:

"The claim asserted by the defendant adverse to the plaintiff must also be set out particularly, so that it may be determined whether it is a claim or title apparently good upon its face, or such a claim or such a title as the plaintiff will be allowed to attack in a court of equity."

Story Eq. Pl. Sec. 255 and 256

contain the following:

"Sec. 225 * * * In the next place it is a general rule that whatever is essential to the rights of the plaintiff, and is necessarily within his knowledge ought to be alleged positively and with precision * * *

"On the other hand the claims of the defendant may be stated in general terms. * * * "

"Sec. 255. Still, however, even when the fact rests within the knowledge of the defendant if it constitutes a material allegation in the bill and is the foundation of the suit it must be clearly stated."

From

Hogg Eq. Proc. Sec. 116

we quote the following:

"The property in question should be described in the

bill, with sufficient certainty for identification and the adverse claim asserted by the defendant should be set forth in the bill in such manner as to show to the court that the claim amounts to a cloud upon the title of the plaintiff's property."

From

1 Beach Mod. Eq. Pr. Sec. 136

we quote:

"An allegation in a bill to remove a cloud on title that 'said claim is an injury' to complainant is not sufficient unless facts are stated from which the court can see that there is or may be a legal injury by the existence of the claim."

From

O'Hara v. Parker, 39 Pac. 1004

we quote:

"The complaint in the case at bar was framed with the purpose in view of removing a cloud from title. It is held that in such a suit the complaint should state the nature of defendant"s claim which constitutes the alleged cloud, and then state such facts and circumstances in respect to the claim as to show its invalidity. The suit is substantially one to determine the validity of some instrument or proceeding which it is claimed injuriously affects or clouds plaintiff's title. Teal v. Collins, 9 Or. 91. A suit to remove a cloud and one to quiet title are essentially different."

The state of Oregon has a statute similar to said Section 6870. In a late decision (September 29th, 1914) the Supreme Court of that state held a suit to remove a cloud maintainable.

Richards v. Mohrs, 143 Pac. 1102;

From the opinion in which case we quote the following:

"(1) A cloud on a title to real property is created by an attempted conveyance thereof by a stranger or an apparent lien imposed thereon in invitum, which, if valid, would impair the owner's estate in the prem-

ises, but which grant or incumbrance can be shown by extrinsic evidence to be void or inapplicable to the estate in question. A suit to remove such cloud is an endeavor in a court of equity to have declared invalid a seemingly operative instrument, decree, judgment, or other proceeding, the weakness of which cannot be disclosed from mere inspection, but recourse must be had to evidence aliunde, to render which admissible it is essential to set forth in the complaint the facts constituting such infirmity. Teal v. Collins, 9 Or. 89; O'Hara v. Parker, 27 Or. 156, 39 Pac. 1004; Shannon v. Portland, 38 Or. 382, 62 Pac. 50; Moores v. Clackamus County, 40 Or. 536, 67 Pac. 662; McLeod v. Lloyd, 43 Or. 260, 71 Pac. 795, 74 Pac. 491.

"(2) If this suit was designed to remove a cloud from the title to real property, the complaint is insufficient because it does not set forth the particular muniments constituting the outstanding claim or incumbrance, or allege the infirmities which render such written evidence void. Shannon v. Portland, 39 Or. 382, 62 Pac. 50."

The rule which renders it necessary that in a bill to remove a cloud the claim of title of the defendant should be particularly described is clearly recognized by this court in the case of

Phelps v. Harris, 101 U. S. 370, 25 L. ed. 855

where the court said:

"The questions, what constitute such a cloud upon title (sufficient to give a court of chancery jurisdiction), and what character of title the complainant himself must have in order to authorize a court of equity to assume jurisdiction of the case, are to be decided upon principles which have long been established by those courts (courts of chancery). Prominent amongst these are: First, that the title or right of the complainant must be clear; and, secondly, that the pretended title or right which is alleged to be a cloud upon it must not only be clearly invalid or inequitable, but must be such as may either at the present or at a future time, embarrass the real owner in controverting it."

The practice in the Federal Courts with respect to the allegations in a bill to remove a cloud from title are indicated in the case of

Gage v. Kaufman, 133 U. S. 471; 33 L. ed. 725.

From the opinion in that case, delivered by Mr. Justice Gray, we copy the following:

> "The bill alleged that the plaintiff was seized in fee simple of the lands; *that the defendant claimed title to them* under two pretended tax deeds to him from the county clerk, recorded in the office of the county recorder (copies of the records of which were set forth in the bill, showing deeds in the form prescribed by Sec. 221 of Chap. 120 of the Revised Statutes of Illinois of 1874); and further alleged that there was no advertisement of any public sale for nonpayment of taxes on the day mentioned in either deed; that there was no judgment or precept on which the lands could have been sold; that there were no taxes unpaid on which the sale could have been made; that no notice to redeem the lands from such pretended sale was given by the holder of any certificate of such sale, as required by the constitution and statutes of Illinois; and that no such notice or evidence thereof was filed or recorded by the county clerk."

The italics are ours.

The case of

Moore v. McGuire, 142 Fed. 787

and the same case on appeal

Moore v. McGuire, 205 U. S. 214; 51 L. ed. 776

was a suit brought by the complainants, citizens of Illinois against the defendants, citizens of Mississippi, in the Circuit Court of the United States, for the Eastern District of Arkansas, for the removal of a cloud from title to certain real property known as Island No. 76 in the Mississippi river, and alleged by the bill to be in Desha county, Arkansas.

The bill set forth the chain of title upon which the plaintiff relied. We copy the statement concerning that portion of the bill in which is set forth the claims of the de-

fendants from the report of the decision by the Circuit Court which is as follows:

> "It is then charged that the island is in the Mississippi river, lying in front of portions of Bolivar county, state of Mississippi, and Desha county, state of Arkansas; that, ever since the sales made by the government and the conveyance by the state of Arkansas, the lands were assessed and subjected to state and county taxes in Desha county, Arkansas. It is further charged that by act of congress of 1817, admitting the state of Mississippi into the Union, the western boundary of that state was fixed on the eastern bank of the Mississippi river, which has never been changed by any act of congress, and that the said east bank of the Mississippi river is still the western boundary of that state; that in 1836 (Laws 1836, p. 9) the legislature of that state, in establishing the county of Bolivar, fixed the boundary line on the west as 'to the Mississippi river; thence up the Mississippi river.' It is also charged that at the time of the admission of the state of Arkansas into the Union in 1836, and at the date of the survey of the public lands in said state by the surveyor general of the United States for said state, the main channel of the Mississippi river was east of this island, and therefore the island became a part of the territory of said state, although since then the main channel of the river has changed, first to one side and then to the other. That, notwithstanding these facts, the complainants learned in 1899 that the state of Mississippi claimed ownership of these lands by reason of forfeitures for non-payment of the state and county taxes assessed and levied by the authorities of Bolivar county, Miss., and that under such claim the state sold them to the defendants, citizens of Mississippi, who now claim title thereto. That neither the state of Mississippi nor the county of Bolivar made any claim that said island was in that state until in 1882, after changes had been made in the main channel of the Mississippi river. That in 1892 the state of Mississippi sold the island, which it claimed to own by reason of a forfeiture for the non-payment of taxes."

It is to be seen that the question of whether or not the lands belonged to the complainants or defendants depended upon whether they were in Mississippi or Arkansas. The fact that such question was in the case, was only shown by the allegations of the bill as to the claims of the defendants, and their predecessors in interest. Such claims were that the lands were in Mississippi, and, therefore, subject to be taxed as being in that state on account of which Bolivar county, Mississippi, had undertaken to tax them and sell them for non-payment of taxes, a deed having been given to the defendants based upon such proceedings. The act of congress, of March 1st, 1817, (3 Stat. 348 C. 23 Sec. 2), established the point of beginning as follows: "Beginning on the River Mississippi, at the point where the southern boundary line of the state of Tennessee strikes the same." And beginning at the southeast corner the southerly and westerly boundaries were traced as follows: "thence west along the said degree of latitude to the Mississippi river; thence up the same to the beginning."

The Circuit Court held as a question of law that the middle of the main channel of the Mississippi River at the date of the admission of Mississippi as a state into the Union, and not the eastern bank of such river, formed the western boundary of the State of Mississippi, and therefore, the eastern boundary of the State of Arkansas, and then determined as a question of fact that at said date the middle of the main channel of such river was west, and not east, of the island which was the land in controversy, and that such island was therefore in the State of Mississippi, and the bill was dismissed. An appeal being taken to this court, objection to the jurisdiction was presented, the contention apparently being that the decision of the case depended, or might depend, upon the determination of a question of fact merely, and therefore, did not require the construction of a law of the United States. This court, Mr. Justice Holmes delivering the opinion, without noticing the fact of diversity of citizenship, held that the federal question involved in the case was sufficient to give jurisdiction, and the objection was overruled, the court saying:

> "This is a bill to quiet and remove a cloud upon the title to land alleged to be in Arkansas. The circuit court found that the land was in Mississippi and

dismissed the case for want of jurisdiction. 142 Fed. 787. The judge made the usual certificate, and an appeal was taken to this court."

"The land in controversy is Island No. 76, formerly called Chapeau island, in the Mississippi river, and whether it is part of Arkansas or of Mississippi depends, as both parties agree, on what was the western boundary of Mississippi, as established by the act of Congress admitting that state to the Union. Act of March 1, 1817, Chap. 23 (3 Stat. at L. 348). In that act the state is bounded by a line 'beginning on the river Mississippi' and running around the state 'to the Mississippi river, thence up the same to the beginning.' The plaintiffs contend that these words should be construed to bound the state on the eastern bank of the river, while the defendants maintain that they refer to the middle of the main channel, as it then was. The chief difference is upon the question of fact whether the main channel was to the east or west of the island in 1817; but as the construction of the statute also is in dispute, there is jurisdiction, and Joy v. St. Louis, 201 U. S. 332, 50 L. Ed. 776, 26 Sup. Ct. Rep. 478, cited by the appellees, does not apply."

The court then assumed, for the purpose of the decision, that the boundary is the middle of the main channel as it was in 1817, and then found as a question of fact that at that date the middle of the main channel was not west of the island as the Circuit Court had found, but was east of it, and the decision of the Circuit Court was therefore reversed without the court being in any way required to construe the act of congress referred to, or to determine any federal question. Since this court held there that a federal question arose in the case (although such question was not determined), it must have held that the allegations as to the claims of the defendants were material for it was only by reason of the allegations that the defendants claimed that the island was in Mississippi and not in Arkansas, that it was made to appear that the case was one involving a construction of the Act of Congress. As Arkansas has a statute (Section 6120 Digest, Stat. Ark. 1894), similar to said Section 6870 this court must also

have held that the existence of such a statute did not deprive the federal court of equity sitting in Arkansas of the power to entertain a bill to remove a cloud on the title of land situated in that state. The fact that the court entertained jurisdiction without a discussion of that question indicates that in the opinion of the court it was a proposition so well settled as not to require notice.

In the opinion of the lower court, in this case, the decision of this court in that case is inapplicable. Concerning that point it said:

> "The Circuit Court held that the land was in the State of Mississippi and dismissed the suit for want of jurisdiction. But whether the land was within the jurisdiction of the court or not clearly appeared from the statement of the plaintiff's claim. True the bill set forth the claim of the defendant but that added nothing to the statement of the plaintiff's claim insofar as the situs of the property was concerned. The Supreme Court held that the Circuit Court had jurisdiction because the construction of the act of congress admitting the state of Arkansas to the Union and defining its boundaries was in dispute, but as already stated, the fact that the construction of this act of congress was in dispute clearly appeared from the statement of the plaintiff's claim, and without any regard to the adverse claim asserted by the defendant."

If the statement contained in the bill in that case as to the claims of the defendant was mere surplusage, how was it made to appear from the bill that the decision of the case might require the construction of the act of congress defining the boundaries of the State of Mississippi? Not by the mere statement of the claim of the complainants because that required merely an allegation that the lands were owned by them and were situated in the State of Arkansas. It was because of the allegations as to the claims of the defendants that this court said:

> "But as the *construction of the statute* is also in dispute, there is jurisdiction."

The opinion of the court below cites as bearing on the question here: Holland v. Challen, 110 U. S., 15; Reynolds

v. Crawfordsville Bank, 112 U. S., 405; More v. Steinbach, 127 U. S., 70; Goldsmith v. Gilliland, 22 Fed. 865; California Oil & Gas Co. v. Miller, 96 Fed., 12.

Let us see what those decisions are: In Reynolds v. Crawfordsville Bank, supra, the question presented was whether a litigant can maintain in a federal court a suit based upon a statute of Indiana similar to the said statute, Section 6870. There was no question in the case as to whether or not notwithstanding such statute such litigant could maintain in such court a bill to remove a cloud. The suit which was brought was clearly one under the statute There was no attempt to allege the facts necessary to be alleged in a suit to remove a cloud independently of the statute, and there was no decision by the court as to what facts should be alleged in a suit of that character.

In Holland vs. Challen, supra, it was held that under a similar statute in Nebraska a suit could be maintained in a federal court of equity sitting in Nebraska by alleging the facts merely, which were required to be alleged under the statute, and that under such statute a suit could be maintained not only in cases where a suit to quiet title would formerly lie, but also in cases where prior to the passage of the statute a bill to remove a cloud could be maintained. The decision, however, is only that a suitor may proceed under the statute in a case where he could have brought a suit to remove a cloud. There is no intimation that a suitor may not, if he chooses, proceed exactly as he would have proceeded prior to the passage of the statute.

Concerning the case of California Oil & Gas Company vs. Miller, supra, the trial court said that the question which it had before it was there decided adversely to our contention. It is very evident that we failed to make our contention understood. What was said in the opinion in that case as to whether or not allegations as to the claims of the defendants are material or immaterial, can have no bearing here, because that was a statutory suit to quiet title. There was no allegation of the existence of any instruments constituting a cloud upon title, and no attempt to state a cause of suit for removal of a cloud.

What is said in that case concerning the effect of failure of the defendants to interpose as a defense the claims which the bill anticipates, and also concerning the proposi-

tion that jurisdiction exists when the federal question arises, and does not exist on the mere possibility that such question may arise, will be referred to under the appropriate heads.

We have been unable to discover the applicability of More vs. Steinbach, supra. The opinion in no place discusses the question of jurisdiction of the federal, circuit or district courts, or in any way refers to the question of whether or not a suit may be maintained to remove a cloud from title. The suit was one under the California statute to determine an adverse claim. The bill is in the usual form in suits of that character except that it contains the allegation unnecessary in such suits, that the adverse claim which it is alleged the defendant asserts is wholly unfounded and invalid in law, or in equity, and that its assertion depreciates the value of the complainants' title.

In Goldsmith vs. Gilliland, supra, it is stated that under Section 500 of the Oregon Code of Civil Procedure to determine an adverse claim to real property, it is not necessary to allege whether such claim casts a cloud upon title or not, or to state the nature or circumstance of the defendant's claim, but that in a suit to remove a cloud upon real property it must appear that there is such a cloud, and of what it consists, and that case therefore, supports the appellants' contention.

In the opinion of the court below it is said:

> "Jurisdiction cannot be created by anticipating the defendant's claim or by alleging that the defendant will interpose a defense arising under the constitution or laws of the United States."

There can be no possible doubt of the correctness of the foregoing statement. The court added to it, however, the following:

> "I do not understand that these general propositions are controverted by the plaintiffs, but they earnestly insist that the rule is otherwise in suits to remove a cloud."

From the statement last quoted, it is evident that the lower court was laboring under an entire misapprehension

as to our contention. The rule that jurisdiction cannot be created by anticipating a defense is of universal application applying with equal force to all suits, including suits to remove a cloud from title. The error of the learned judge who heard the motions to dismiss consists, in part, in overlooking the fact that the allegation in a bill that the defendants assert a claim is not always in *anticipation* of a claim or in anticipation of a defense. That is not a statement that the defendants will interpose such claims as a defense. In certain classes of cases, such allegation is a material and essential part of the statement of the complainant's case. If the suit is one which is only maintainable by reason of the fact that a claim is asserted, a bill which fails to contain such allegation is insufficient in that it fails to state a cause of action. In More vs. Steinbach, supra, the allegation of the bill (which allegation was deemed essential), is that the defendants claim an estate adverse to the complainants in the property described and alleged to be owned by them.

In

Northern Pacific Railway Company vs. Hauswirth, 49 Mont. 135; 140 Pac. 516,

the Supreme Court of Montana held that a complaint in an action under said Section 6870 which failed to allege that the defendant asserted a claim adverse to the plaintiff did not state a cause of action, From the opinion we quote:

> "Again, if we accept the theory of counsel that the action is one to quiet plaintiff's title under Section 6870 of the Revised Codes, we reach the same result. The complaint does not allege that the defendant asserts a claim to any portion of the right of way adverse to the plaintiff. Hence it does not state a cause of action."

How can it be held that in a suit under the statute an allegation that the defendant asserts an adverse claim is not in anticipation of a defense, and a contrary decision be made concerning a like allegation (to which is added a specific description of such claim), in a bill to remove a cloud?

Another instance in which it is necessary in order that

the jurisdiction of a federal court be invoked without diversity of citizenship is that of a suit under subdivision 16, section 629 of the Revised Statutes which provided that the Circuit Courts should have jurisdiction "of all suits authorized by law to be brought by any person to re-dress the deprivation under color of any law, statute, ordinance, regulation, custom or usage of any state of any right, privilege or immunity secured by the Constitution of the United States." The cases provided for in that section are now undoubtedly covered by Subdivision 1 of Section 24 of the Act of March 3, 1911, Chap. 231, which provides that the District Court shall have original jurisdiction of all suits of a civil nature at common law, or in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and arise under the constitution or laws of the United States. It has been repeatedly held that in order to state a cause of action under the said Subdivision 16, of Section 629, it was necessary that the plaintiff allege as part of his case that the defendant claimed to act under color of a statute, ordinance, etc., of a state or territory. In other words, it was necessary to allege the claim of the defendant, and such allegation was a necessary part of the plaintiff's statement of a cause of action,

> Crystal Springs Land & Water Company vs. City, 76 Fed. 148;
> City Railway Company vs. Citizens' Railway Company, 166 U. S. 577; 41 L. ed. 1114;
> Railway Company vs. Ziegler, 167 U. S. 65; 42 L. ed. 79.

In California Oil & Gas Company vs. Miller, supra, it was said that allegations as to particular claims of the defendants should be disregarded in determining the jurisdictional question for the reason that the defendants might not make the claims which the bill alleged that they made. In a case of the kind there under consideration such allegations, of course, should be disregarded, but not for the reason stated. Such allegations in the bill there considered were merely surplusage, and the case could not be affected either by the admission or denial of them.

It was suggested in the oral argument in the lower court in this case, that the defendants might, in their answer,

make different claims from those which the bill alleges that they made, and it was further suggested that in such a situation the case would not be one, or might not be one, requiring in its decision the construction of any act of congress. We cannot concur in that statement. As the allegations are material, it is, of course, necessary for the complainants to prove them, and if they fail to do so they will suffer the same consequences as for a failure to prove any other material allegation including the allegation that the matter in controversy exceeds the sum or value of $3,000. The allegation is not that the defendants, will, in their answer, make such claims. The allegation is that they do or did make such claims at the time of the commencement of the suit. That they claim under the declaratory statements of location and certificates of location annexed as exhibits to the bill, cannot very well be denied because a part of such exhibits are signed and sworn to by some of the defendants. The other specifically described claims of the defendants may be proved if necessary by the record in another case where such claims were specifically made concerning the very property here in controversy. The complainants may also prove that such claims were orally made at the time of the commencement of this suit. It is utterly immaterial, therefore, whether the defendants admit the making of such claims or set up other claims.

In the oral argument in the court below, counsel for the defendants contended that it was unnecessary to allege facts showing the invalidity of the instruments of record constituting the cloud, but that the general averment of their invalidity would be sufficient. Such a general averment would, of course, be the averment of a mere legal conclusion, and of no effect. The rule is stated in:

> Knudson v. Curley, supra;
> Walton v. Perkins, supra, and in
> 17 Ency. Pl. & Pr. 340,

as follows:

> "Thus where it is sought to remove a cloud by a bill in equity facts should be stated from which the court can draw the conclusion that the defendant's claim is a cloud. This will usually involve a statement of facts showing the apparent validity of the

instrument sought to be cancelled as a cloud, and also facts showing its real invalidity."

"A mere averment of its invalidity as a conclusion of the pleader is insufficient."

A similar averment was declared by this court to be the averment of a mere legal conclusion in:

Ritchie vs. McMullen, 159 U. S. 235, 40 L. ed. 133,

where it was held that the allegation that a judgment was an "irregular and void judgment" was insufficient. From the opinion in that case we quote as follows:

"The general averments, in the first part of the answer, that the judgment was 'an irregular and void judgment,' and, in the second part, that 'said judgment was irregular,' and 'without any jurisdiction or authority on the part of the court to enter such a judgment upon the facts and upon the pleadings in said action,' are but averments of legal conclusions, and wholly insufficient to impeach the judgment without specifying the grounds upon which it is supposed to be irregular and void, or without jurisdiction or authority to enter it."

This case, of course, is not affected by the fact that it is a suit against numerous defendants (twenty-one in number), asserting distinct and individual interests, and that the jurisdiction of the court, as a court of equity, is invoked partly on the ground of avoiding a multiplicity of suits. For that reason complainants would not be required to prove that they were in possession at the time of the commencement of the suit or that their possession had been long continued or that their title rests upon undisputed evidence, but they are not relieved of the necessity of alleging and proving that the instruments of record and alleged to cast clouds upon their title are in fact clouds, and that the case is one of which the court will entertain jurisdiction as a suit to remove a cloud, which requires allegations and proof of facts showing that the instruments so of record and apparently valid are in fact invalid, and that if the clouds cast are not removed that they will, or may cause injury to the complainants.

The allegations of the location of the Point Pleasant and Pleasant View Lode Claims, of the filing of the adverse suits, and of the judgments therein, and proceedings in the Land Office thereunder, are, of course, material allegations since they show the invalidity of the instruments which are alleged to constitute clouds.

IV.

IS IT NECESSARY THAT THE COMPLAINANTS, RELYING UPON THE JUDGMENTS RENDERED IN SUCH ADVERSE SUITS AS AN ABSOLUTE BAR APPEARING UPON THE FACE OF THE RECORD AGAINST ANY AND ALL OF THE CLAIMS OF THE DEFENDANTS BY VIRTUE OF LOCATIONS SUBSEQUENT TO THE ISSUANCE OF PATENT, SHOULD PLEAD SUCH JUDGMENTS AND THE PROCEEDINGS IN THE LAND OFFICE THEREUNDER?

If the suit is one to remove a cloud, such judgments, as we have already seen, may be pleaded for the purpose of showing the invalidity of the paper writings complained of as clouds. If the view of the trial court is correct and this case is not one to remove a cloud, but is a suit under the said Section 6870 to determine an adverse claim, it is still necessary for the complainants to plead such judgments in order that they may rely upon them as a bar to any adverse claim asserted by the defendants as to the land which the bill alleges that the complainants own.

Our contentions as to this point were not noticed by the lower court. The rule is well stated in

Turley v. Turley, 1 S. W. 891

(the opinion there being delivered by Judge (now Mr. Justice) Lurton, as follows:

> "It is settled that former judgments may be relied upon in the evidence, under the general issue, in trials at law. Estill v. Taul, 2 Yerg. 466; Bugg v. Norris, 4 Yerg, 327; King v. Vaughn, 8 Yerg. 60; Witcher v. Oldham, 4 Sneed, 222; Warwick v. Underwood, 3 Head, 232. This rule of pleading at law by no means

determines the rule in equity. No rule of equity procedure is better settled than that evidence relating to matters not stated in any pleading cannot be made the foundation of a decree. 'The rule requires,' says the learned editor of the fifth edition of Daniell's Chancery Practice, 'the introduction into the bill of every material fact which the plaintiff intends to prove.' 'The same rule applies to the answer and a defendant cannot avail himself of any matter in his defense which is not stated in his answer, though it appear in his evidence.' Daniell, Ch. Pr. (5th Ed.) 853."

From

Section 345, 1 Beach Mod. Eq. Pr.

we quote:

"The defense of *res adjudicata* should be pleaded either by special plea in bar or relied upon in answer. If the fact does not appear either in the bill, plea or answer, it cannot be relied upon in the evidence."

9 Encyc. Pl. & Pr. 615

contains the following:

"In equity, the defense of former adjudication, to bar a hearing on the merits, must always be set up by proper averments in the pleadings."

The rule was declared in this court as early as the case of

Crockett v. Lee, 7 Wheat. 522[5] L. ed. 513,

where, Chief Justice Marshall delivering the opinion of the court, it was held that a bill in a suit to quiet title where the chain of title of both the complainant and defendant was set out, was insufficient to support a decree on the ground that the location of the land under which the defendant claimed was insufficient because no issue as to the insufficiency of such location was tendered by the bill. Concerning the reasons for the rule of pleading declared, in the course of the opinion it was said:

"If the pleadings in the cause were to give no notice to the parties or to the court of the material facts on which the right asserted was to depend, no notice of the points to which the testimony was to be direct-

ed, and to which it was to be limited; if a new case might be made out in proof, differing from that stated in the pleadings, all will perceive the confusion and uncertainty which would attend legal proceedings, and the injustice which must frequently take place."

The case of

Blandy v. Griffith, Fed. Case No. 1529

was a suit in equity to restrain the defendants from infringing certain patent rights. Prior to the filing of that suit the plaintiff had brought another suit against the defendants and had recovered damages for an infringement of the same patents. Evidence was offered on the hearing to prove such former judgment, but the same was excluded and was not admitted for the reason that such former judgment had not been pleaded. In passing upon the point, the court said:

"If the complainants desire to bring the subject before the court as matter of estoppel, the bill should have averred the judgment."

This point was passed on in the case of

Bryar v. Campbell, 177 U. S. 649; 44 L. ed. 926

and the court there said:

"The question is whether, having abandoned the original decree for a new action in the state court in which she was defeated, her heirs can now claim that the original decree in the district court, though not set up as a bar by either party, and notwithstanding the appeal, can be resuscitated after a lapse of sixteen years for the purpose of defeating the action of the state court. To state this proposition is to answer it. The state court was at liberty to proceed to dispose of the case upon the issues made by the parties, and as neither party saw fit to set up the former decree as a bar to the action, the state court was not bound to notice it."

See also

Gerber v. Gerber, 40 N. E. 581;
Evans v. Woodsworth, 72 N. E. 1082;
Mettler v. Warner, 90 N. E. 1099.

The case is not affected by the fact that it is possible for the defendants to assert a claim to the property in question not based upon any locations made subsequent to the issuance of patent. In that event the judgments would not operate as a bar as against such claims, since the effect of the judgments is only to bar the assertion of any claim to the land in controversy based on a location made subsequent to the issuance of patent. It is, however, open to the defendant in any case where a judgment is pleaded to avoid the bar of the judgment pleaded if he can, and if the complainants here relied upon the judgments as a bar to any defenses which the defendants might make in support of an adverse claim to the property in question, it was incumbent on them to plead them. The question is in this case, therefore, as to whether the allegations concerning such judgments and the proceedings in the land office thereunder, are sufficient to show that the case is one arising under the laws of the United States, regardless of whether the case be considered as one to remove a cloud from title or a statutory suit to determine an adverse claim.

ARE THE ALLEGATIONS OF THE BILL, INCLUDING THE SPECIFIC STATEMENT OF THE CLAIMS MADE BY THE DEFENDANTS, AND THE ALLEGATIONS AS TO THE RECOVERY OF THE SAID JUDGMENTS, AND THE PROCEEDINGS IN THE LAND OFFICE THEREUNDER, SUFFICIENT TO SHOW THAT THE CASE IS ONE ARISING UNDER THE LAWS OF THE UNITED STATES?

Under the rules established by the foregoing authorities all of the allegations of the bill set forth in the statement of the case herein are necessary. As the invalidity of the paper writings of record must be shown, all of the allegations specifying the claims of the defendants are necessary. An allegation, for instance, that there were no veins known to exist within the Butte & Boston placer at the date of the application for patent, would be meaningless without the further allegation that the defendants claimed that such known existence of such leads, rendered the ground subject to location and enabled them to make a valid lode location on it. So with respect to the allegations relating to width of area of surface ground on each side of the lead,

and length along the strike of the lead, which might be located, assuming that a vein was known to exist at such date. Complainants must have the right to show that each of such locations is in part invalid even though the known existence of such a lead should be established. Any allegation in that respect would be unintelligible without appropriate allegations showing that complainants hold under a placer patent; that defendant's lode locations are made within the boundaries thereof; that such locations have a length and breadth of 1500 feet and 600 feet, respectively, and that defendants claim the full extent of the ground located.

It remains to point out the particular laws of the United States, the construction of which is, or may be required by the decision of the case.

If the defendants should not file an answer in the case and the allegations of the bill should be thereby admitted, the case would be in the same condition, of course, so far as the question of jurisdiction is concerned, as it would if they should file an answer denying all of the allegations of the bill, excepting the allegations as to the claims made by them, such allegations being admitted, proof was made by complainants of all allegations not admitted, and defendants produced no evidence.

If the defendants should file an answer denying that they make any claim under such locations, but should allege that they make claim to the ground based upon some other proceedings, as for instance, purchase at a tax sale, such allegation would not, assuming that our contention that this suit is solely one to remove a cloud is correct, be responsive to the bill, and in any event would not be sufficient to show that the instruments of record constituting the clouds should not be cancelled, and the case viewed in its jurisdictional aspect would be the same as in the situation considered above.

Consideration of the question of jurisdiction in a case under the said Subdivision 16, of said Section 629, as it would be presented if, in such a case, no answer be filed and proof be made of the allegations of the bill only, or if answer be filed denying that the defendant made the claims alleged, and alleging that he made other claims, but not under any state statute, or ordinance, will help in solving the jurisdictional question in this case. In the cases sup-

posed under said Section 629, the court, no doubt, would not be held to have lost jurisdiction, but whether that is so or not cannot affect the jurisdiction which the court has at the commencement of the suit. In a case under the said Subdivision 16, of said Section 629, it would be necessary, as we have already seen, that the plaintiff in order that he state a case, allege that the defendant claimed to act under color of a statute, ordinance, etc., of a state or territory. Because of the possibility of defendant denying in his answer that he claimed to act under any statute or ordinance it could not be held that the case was not one arising under the laws of the United States, and the same rule applies to this case.

As we have undertaken to show that the lower court had jurisdiction even though the suit were held to be one to determine an adverse claim under the statute, we will consider the case here in the aspect which it would assume if it should be held that the suit is of that character. If the suit is one to determine an adverse claim merely, the case would be determined upon such affirmative allegations of the answer, the burden of proving them being on the defendant, but the jurisdiction of the court would still be maintainable as one arising under the laws of the United States because of the allegation as to such judgments, the question as to the effect of such judgments being held to have arisen in the case, though the case might not be decided upon them.

If the defendants should answer admitting that they make the claims which the bill alleges under the paper writings set forth in the bill, the case might be decided solely upon a question of fact. For instance, the court might decide as a question of fact that the Point Pleasant and Pleasant View lode claims were never in fact located, and further that at the date of the placer application there was no vein or lode known to exist within the ground in controversy. The court, however, might, with equal propriety, pass the question of whether the Point Pleasant and Pleasant View locations were located, and consider the question of whether or not, if they were located and continued in force up to and including the date of the issuance of patent, they could not nevertheless have the effect of rendering the patent invalid as to the land in conflict because of the judgments in the adverse suits, and the proceedings in the land office thereunder.

The appellants contend that the effect of the judgments in the adverse suits is such that it must be held regardless of what the facts actually are that the Point Pleasant and Pleasant View lode claims were void ab initio. Appellants also contend that because of said judgments it must, under the law, and irrespective of what the facts are, be held that no vein or veins were known to exist within the ground in controversy at the date of the placer application.

Such contentions are based on the provision of

Sec. 2326, R. S. U. S.,

which is as follows:

> "Sec. 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that

several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the commissioner of the general land office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining-claim to any person whatever."

Under the provisions of this section, upon the recovery of such judgments and the filing of a certified copy of the judgment rolls in the local land office, the proceedings are required to be certified by the register to the commissioner of the general land office "and a patent shall issue thereon for the claim or such portion thereof as the applicant *shall appear from the decision of the court* to rightly possess." Since by such statute it was made the duty of the register to file the proceedings with the commissioner of the general land office upon the filing of such certified copy of the judgment rolls, and it was in like manner made the duty of the commissioner to order patent to issue when they were filed, the law in other respects being complied with, it cannot be held that the existence of prior lode locations which had been made the basis of the adverse claims then presented any obstacle to the issuance of patent. Now it appears from allegations which we have shown are a proper part of the bill that the court, when it comes to consider the case finally must (if it does not decide as a question of fact that there was no valid Point Pleasant or Pleasant View lode location) determine such contentions, and in doing so the court must construe the said Section 2326. Whether our contention is good or bad, depends upon the interpretation given to the language of that statute. The same contentions were made in the Circuit Court of Appeals in the case of

Mason v. Washington-Butte Mining Co., 214 Fed. 32.

That court passed upon the question, and in doing so found it necessary to determine the meaning of the said Sec-

tion 2326 as appears from the following extract from the opinion.

"We are of the opinion also that both the lode locations were rendered void ab initio so far as they included any of the land in controversy, by the judgment in the adverse proceedings. Section 2326 of the Revised Statutes, under which the adverse proceedings was had, requires the adverse claimant to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and declares that his failure to do so shall be a waiver of his adverse claim, and that after judgment the whole proceeding and the judgment shall be certified by the register to the commissioner of the general land office, and the statute provides that a patent shall issue thereon for the claim 'or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess.' There is no question here involving the doctrine established by Belk v. Meagher, 104 U. S. 279, Noyes v. Mantle, 127 U. S. 348, Brown v. Gurney, 201 U. S. 184, and Farrell v. Lockhart, 210 U. S. 142, to the effect that mineral ground covered by a valid location is, during the life of the location, segregated and not open to location by another, and that until a location is terminated by abandonment or forfeiture, no right or claim to the property can be acquired by an adverse entry thereon, with a view to the relocation of the same. In Duffield v. San Francisco Chemical Co., 205 Fed. 480, we said 'By these statutes there was relegated to a court the jurisdiction to determine the right of possession between the adverse claimants. The determination of that question necessarily involves, not only the question which of the adverse claimaints was prior in time in making location; and whether the location was made in compliance with the law, but also, the question whether the land occupied and covered by the location was subject to location in the manner in which it was attempted to be acquired.' In Iron & Silver Min. Co. v. Campbell, 135 U. S. 206, the court said that the result of the judicial investigation 'shall govern the action of the officers of the land department in determining which of these claimants shall have the patent,

> the final evidence of title, from the government.' And in Mining Co. v. Tunnel Co. 196 U. S. 337, 357, the court said that the decision of a conflict between two mining claimants is 'a decision which will enable the land department without further investigation to issue a patent for the land.' "

If the court should, upon any ground, hold that the placer patent was not rendered invalid as to the ground in conflict by reason of such prior locations, it would then be called upon to pass on the question of whether a vein was, or veins were known to exist within the limits of the Butte & Boston placer at or prior to the date of the placer application. The question could be disposed of by the court by assuming that such veins were known to exist, but that the defendants were barred from asserting their known existence on account of said judgments in the adverse suits. The determination of that question would require the construction of said Section 2326. As to this point the contention of the appellants is that between the parties to the said judgments it was conclusively determined that there was no such known vein, since the determination of the right of possession between these adverse claimants necessarily involved the question of whether the land occupied and covered by such respective locations was subject to location in the manner in which it was attempted to be acquired,

Mason v. Washington-Butte Mng. Co., supra.,

and that while the United States was not a party appearing upon the face of the record, under the provisions of the said Sec. 2326, the United States has consented to be bound by such judgment as to all questions which are determined by it. Patent may be withheld after the recovery of such judgment by failure on the part of the applicant for it to comply with the law in other respects, but such patent may not be withheld from the applicant upon the ground that as between the adverse claimants the one against whom judgment was rendered was, as a matter of fact, entitled to the land. To that extent therefore the United States was bound by the judgment and in a sense was a party to it, since it is only those who are parties and privies who are so bound. Now since the United States was a party to the said judg-

ment the defendants in this suit are also bound, since if they have any rights, the same were obtained from the United States.

Upon this contention if the court shall decide against us, it must, in doing so, hold that by the terms of the said Sec. 2326, the United States is not such a party, in other words, in passing on the point, the court must construe the said law of the United States. That the decision of the point requires a construction of said section appears from the decision in the case of

> Butte Land & Investment Co. v. Merriman, 32 Mont. 402; 80 Pac. 675,

a portion of the opinion in that case being as follows:

> "Sec. 2326, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1430), which makes provision for the proceedings to be had in case an adverse claim be filed to an application for patent, among other things provides: 'It shall be the duty of the adverse claimant, within thirty days after filing his claim to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure to do so shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the commissioner of the general land office and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess.' This is the only provision under which the government has agreed to be bound by the judgment of a state court, if at all, and to what extent has it done so in this instance? It has

said, in language which is free from ambiguity, that for the purpose of determining which, if either, of two claimants is entitled to possession of the ground in controversy, it will relegate them to the local courts, where such questions may be determined, and that the government will accept the judgment as conclusive, as between the parties to it, of the right of the prevailing party to assert his claim before the land department."

Of course decisions to the effect that a mere question of whether or not effect should be given to a judgment and other like questions plainly are not sufficient to give jurisdiction because the decision of such question does not involve the construction of any law of the United States. It depends on general principles of law, and further the answers to such questions are so obvious that they cannot be considered substantial questions. Of like character, are decisions to the effect that the question of whether or not a judgment duly rendered by a court of competent jurisdiction and having jurisdiction of the subject matter and of the parties, is binding upon the parties to such judgment. Those cases are substantially different from the case here. The Circuit Court of Appeals, for the Ninth Circuit, in the case of Mason v. Washington-Butte Mining Company, supra, held that the judgments in the adverse suits were conclusive of the question of whether or not the prior locations were valid at the date of the issuance of patent, not only upon the parties to such judgments, but also on the defendants in that suit, they being in part the same persons who are appellees here. The supreme court of Montana in the case of Butte Land & Investment Company v. Mason, supra, held that such judgments were not conclusive on the question of the known existence of veins within such ground as against the defendants in that suit, (they being in part the said appellees), for the reason that such defendants were not parties to the adverse suits. If both of these decisions are correct the question still remains to be determined why the judgment in one case is conclusive as to persons who were not parties to the judgment and is not conclusive in the other case. The question which this case presents is not whether a judgment is binding as against those who are parties to it, and those in privity with

such parties, but whether the United States was in any respect, or as to any question, bound by the said judgments, and, if so, whether it was, or was not, in any sense, a party to such judgments.

Should the court, when it comes to consider any of these questions, decide against the contention of the appellants, it will nevertheless be called upon, in doing so, to construe the said statute. If the court should hold that the Butte & Boston placer is not invalid as to the ground in conflict and that a vein was, or veins were, known to exist within the limits of the Butte & Boston placer at the date of the said application for patent, and that the said judgments do not constitute a bar to the assertion of the existence of such known veins, it would then be called upon to determine the further question of the extent of surface ground on each side of such vein which could be embraced in a lode location, and whether any portion of the vein along its strike could be located which had not been actually exposed at the date of the application for placer patents, and in determining such questions must construe certain statutes of the United States.

Sec. 2333, R. S. U. S.

is as follows:

> "Sec. 2333. Where the same person, association, or corporation is in possession of a placer claim and also a vein or lode included within the boundaries thereof application shall be made for patent for the placer claim with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for patent for such placer claim which does not include an application for the vein or lode

claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

That a determination of the limit of such width of such location involves a construction of said section, appears from a portion of the opinion in

Mt. Rosa M. M. & L. Co. v. Palmer, 26 Colo. 56; 56 Pac. 176

(where it was held that the width of such location could not exceed fifty feet) as follows:

"We think it is manifest that the lode or vein referred to in the first and third provisions is the same thing, and that whatever a placer claimant would acquire by availing himself of the privilege accorded him by the first provision of the section, is reserved by virtue of the third provision; in other words, that the same extent of surface ground that is incident to such lode or vein, if located and patented by the placer claimant, is reserved from the placer patent in case of his failure to claim and patent the same. If he elects to patent the lode, he is required to take twenty-five feet on each side of the center of the vein, and pay therefor at the rate of five dollars per acre. This is a privilege accorded to him, which he may avail himself of, or not, as he sees fit. If he elects to waive this privilege, he may do so in one of two ways—either by expressly excepting the lode from his placer location and application for patent, or remaining silent in regard to it. If silent, then by implication he declares that he makes no claim to such lode and by such silence is bound to the same extent, and in the same manner, but no further, than he would have been by any express declaration. By electing to make no claim to a known lode, or express declaration in regard to it, he must be understood as claiming for placer purposes, the greatest possible area within the boundaries of his placer claim, and should be held to have relinquished

only that which he might have taken, which is the lode, with the amount of surface ground provided."

And from the opinion in

South Butte Mng. Co. v. B. & V. Mng. Co., on file in the lower court,

(where it was held that the limit of the width of such location is fifty feet plus the width between the walls of the vein located) as follows:

"The decree in this case is erroneous, and is hereby ordered set aside and vacated.

"I still think, however, that the defendants must prevail generally, but the extent to which their rights should be upheld must be limited. Under Sec. 2333 R. S. U. S. they can only take a decree for the lode referred to in the memorandum opinion as having a southeast, northwest strike and a southerly dip, and which was well known to exist prior to October 21, 1881; and for twenty-five feet of surface on each side thereof.

"But to define the lode with satisfactory precision is, I think, impossible under the evidence; and as the surface to belong to the defendants can only be described after the lode is defined, it becomes equally impossible to define the surface area with accuracy.

"The burden of proving the right to the lode having been put upon the defendants as lode claimants, it is still upon them to prove the size or extent and strike of their lode with a definiteness sufficient to enable the court to describe the lode in order to define the surface, for it is only the lode, and 25 feet of surface on each side of the lode that they are entitled to."

Our contention that only that portion of a vein which is actually exposed can be held to be known to exist and is therefore subject to location, is based upon the provisions of the said Sec. 2333, and is that since under the said section the applicant for patent may cover the vein or lode known to exist by a claim and include in his application an application for patent for it, and if he does so, is required to pay for it at the rate of $5 per acre, but it is only veins or lodes known to exist which may be included, and it is only to the

extent that they are known that they can be paid for, by his failure to include such application in his application for patent he can only be held to have lost that which he might have included, and therefore, it is only so much of the vein as was exposed and capable of measurement at the date of the application that may be held to be still subject to location.

Our contention is supported by the dissenting opinion of Mr. Justice Field in

> Iron S. M. Co. vs. Mike & Starr Co., 143 U. S. 394; 36 L. Ed. 201,

the following extract from which shows that the decision of such question requires the construction of said section:

> "And to embrace the lode within the patent of a placer claim the applicant must, if it be known, pay for it at the rate of five dollars per acre. But he cannot pay any sum, or offer to pay so as to be effectual, until he can ascertain the number of acres contained in the lode claim desired, that is, until the ground can be measured. Nor could the officers of the land department accept any sum from the applicant until such measurement, upon a mere speculative opinion as to the extent of the supposed lode."

ARE SUCH QUESTIONS SUBSTANTIAL AND ARE THEY QUESTIONS WHICH HAVE NOT BEEN DECIDED BY THIS COURT?

The statutes which must be looked to as determining such questions are not so plain and clear as to not require construction. The decision must depend on inferences to be drawn from the provisions of such statutes. The questions are such that members of the bar, learned in the law, may honestly differ as to the proper construction to be given. The arguments made in the two cases, Mason vs. Washington-Butte Mining Company, supra, and Butte Land & Investment Company vs. Mason, supra, appear in the reports of those cases. As to the limit of the width of a lode location which may be made upon ground patented as placer the Supreme Court of Colorado in the case of Mt. Roza Mining & Milling Company vs. Palmer, supra, and the United States Circuit Court, for the District of Montana, in the case of South Butte Mining Company vs. B. &

V. C. M. Co., supra, rendered contrary decisions, one holding that the limit of the width of such location was fifty feet, and the other holding that the limit was fifty feet plus the width of the vein.

None of these questions has been directly passed upon by this court.

DOES THE DECISION OF THE CASE INVOLVE A FEDERAL QUESTION, IF UPON THE FEDERAL QUESTION THE DECISION SHOULD BE AGAINST THE CONTENTION OF THE COMPLAINANTS?

Before the court can decide against us as to any of our contentions as to the effect to be given to any federal statute, it must construe such statutes and in doing so must determine a federal question.

Pacific Electric Ry. Co. vs. Los Angeles, 194 U. S. 112; 48 L. ed. 896;
Siler vs. Railroad Co., 213 U. S. 175; 53 L. ed. 753;
Home Telephone & Telegraph Co. vs. Los Angeles, 227 U. S. 278; 57 L. ed. 510;
Hamilton Gaslight Etc. Co. vs. City, 146 U. S. 258; 36 L. ed. 963;
Raymond vs. Chicago Union Traction Co., 207 U. S. 20; 52 L. ed. 78;
Williamson vs. U. S., 207 U. S. 425; 52 L. ed. 278;
People's Savings Bank vs. Layman, 134 Fed. 635;
Michigan Railroad Tax Cases, 138 Fed 223;
Horner vs. U. S., 143 U. S. 570; 36 L. ed. 266;
Penn. Mutual Life Ins. Co. vs. Austin, 168 U. S. 685; 42 L. ed. 626.

From

Pac. Elec. Ry. Co. vs. Los Angeles, supra,

we quote the following:

"But, however, presented, jurisdiction depends primarily upon the allegations of the bill, not upon the facts as they may subsequently turn out. City Ry. Co. v. Citizen's Street R. Co., 166 U. S. 557; 41 L. ed. 1114; 17 Sup. Ct. Rep. 653. Nor upon the actual

sufficiency, in the opinion of the court, of the facts alleged to justify the relief prayed for. We do not mean, however, that a mere claim in words is sufficient; a substantial controversy must be presented."

DOES THE DECISION OF THE CASE INVOLVE A FEDERAL QUESTION, SINCE THE CASE MAY BE DECIDED UPON QUESTIONS OF FACT ALONE?

Since it appears that there are certain federal questions in the case on which, according to the allegations of the bill, the decision of the case may be based, and the decision of such federal question would be effectual to entirely dispose of the case, it must be held that the case involves the decision of federal questions. In order that it may be so held it is only necessary that in any aspect which the case may assume the decision of a federal question is necessary. From the opinion of Chief Justice Marshall in the leading case of

Osborne vs. Bank, 9 Wheat. 740; 6 L. ed. 204,

we quote the following:

"We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings."

From the opinion in

St. Paul M. & M. Co. vs. Railway Co., 68 Fed. 2,

we quote the following:

"It is proper to observe in this connection that we are not concerned at present with the merits of the several propositions heretofore stated on which the plaintiff bases its claim that the deeds executed by the governor were void, and conveyed no title to the lands situated north of Watab. Whether the construction that is placed on the granting acts by the plaintiff company with a view of impeaching the conveyances is sound or unsound, we need not stop at this point to inquire, because the jurisdiction of the circuit court does not depend on that inquiry. If it appears, in any aspect which the case may assume, that the right of recovery may depend upon a construction of those acts, and if the right to recover so far as it turns on the construction of federal statutes is not merely a colorable claim, but rests upon a reasonable foundation, then a federal question is involved which is adequate to confer jurisdiction."

In the case of

Home Telephone & Telegraph Co. vs. Los Angeles, 227 U. S. 278,

and in

Siler vs. Railroad Company, 213 U. S. 174,

it was held that jurisdiction of the United States Circuit Court which was invoked on the ground that it was shown by the bill that certain acts of the defendant which the complainant complained of deprived the complainant of certain rights guaranteed to him by the constitution of the United States, was not defeated by the fact that it was also alleged in the bill that such acts were in violation of the constitution of the state. From the opinion in the second of the two cases last cited, we quote the following:

"The federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the circuit court jurisdiction, and, having properly obtained it, that court had the right to decide the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.

"This court has the same right, and can, if it deem

it proper, decide the local questions only, and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit."

In

Nashville vs. Cooper, 6 Wall 247, 18 L. ed. 851,

the court in passing on the questions of jurisdiction said:

"Nor is it any objection that questions are involved which are not all of a federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction."

The following pertinent remarks are from the opinion in:

New Orleans vs. Mississippi, 102 U. S. 135; 26 L. ed. 96.

"It is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the Constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is within the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

Moore vs. McGuire, supra, as we have already seen, was decided solely upon a question of fact, and it was nevertheless held that the case was one of which the court had jurisdiction as arising under the laws of the United States.

See also:

Tennessee vs. Davis, 100 U. S. 257; 25 L. ed. 648;

St. Louis I. M. & S. Ry. Co. vs. Davis, 132 Fed. 629;

Williamson vs. U. S., 207 U. S. 425; 52 L. ed. 278.

In California Oil & Gas Company vs. Miller, supra, it was said that "the possibility, or even probability that a federal question may arise during the progress of the case will not

support an original jurisdiction in the Circuit Court, but the plaintiff's statement of his own claim must show that such a question is necessarily involved and must be determined." This statement is undoubtedly correct to the extent that it is not sufficient that a federal question may arise. Such question must arise, otherwise the court has not jurisdiction. If the case is one which in any aspect it may assume, it will necessarily involve the decision of a federal question, the case is one which in fact arises under the laws of the United States, although such federal question may not be decided. That must be considered as having been conclusively determined by the decisions of this court cited above. The statement, therefore, last quoted to the effect that such question must be determined, is therefore, plainly contrary to the decision of this court.

VI.

DID THE LOWER COURT HAVE JURISDICTION?

From the foregoing it appears that the authority vested in the courts of the United States to entertain jurisdiction in a case can in no way be limited by a statute of a state; that the legislature of Montana in passing the said Section 6870 has in no way undertaken to limit the power of the federal courts of equity, sitting in Montana, to entertain jurisdiction in a suit to remove a cloud from title, the same facts being alleged as were necessary prior to the passage of such statute; that in a suit to remove a cloud from title it is necessary to show that a cloud exists and that that involves a statement of the facts showing that the cloud complained of is in fact invalid, and that if left outstanding, injury is threatened to the complainant, which statement ordinarily involves a specific description of the claims made by the defendants under the instrument constituting the cloud; that all of such allegations are a necessary part of the statement of complainants' cause of suit; that such allegations, if they show that the decision of the case involves the construction of a federal statute, are sufficient to show that jurisdiction exists; that in equity suits it is incumbent on the pleader who relies upon a judgment as a bar or as creating an estoppel to plead such judgment;

that all of such propositions are sustained by decisions squarely in point, and of the highest authority; that the averments of the bill other than the allegations concerning said judgments show that the case is one which involves in its decision the determination of certain federal questions; that the judgments pleaded in this case show that the determination of the question of whether they constitute a bar as against the assertion of any claim of the defendants based upon a location made subsequent to the issuance of patent for the land in question requires the construction of a statute of the United States, and are sufficient to show the existence of jurisdiction, whether the case is one to remove cloud or is a statutory suit to quiet title.

We submit, therefore, that the case must be held to be one arising under the laws of the United States, and that the decree of the court below dismissing the case on the ground that it did not have jurisdiction, is erroneous, and should be reversed.

Respectfully submitted,

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JAMES D. MAHER
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. [redacted] 284

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, A CORPORATION, AND ANACONDA COPPER MINING COMPANY, A CORPORATION, APPELLANTS,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, JOHANNA FARLIN, A. F. BUSHNELL, PATRICK LEROUX, J. T. FITZGERALD, ELIZABETH BROWN, C. B. NOLAN, W. D. THORNTON, NANCY HOBBS, LOU H. HADWICK, ANNIE STALKER, M. F. CLEARY, E. J. CLEARY, ADOLPH KEPPLER, J. B. WOODS, RACHEL MERRIMAN, MERTHA McGOWAN, AND ALICE McGOWAN, APPELLEES.

REPLY BRIEF OF APPELLANTS.

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(No. 24,900)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 617.

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, A CORPORATION, AND ANACONDA COPPER MINING COMPANY, A CORPORATION, APPELLANTS,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, JOHANNA FARLIN, A. F. BUSHNELL, PATRICK LEROUX, J. T. FITZGERALD, ELIZABETH BROWN, C. B. NOLAN, W. D. THORNTON, NANCY HOBBS, LOU H. HADWICK, ANNIE STALKER, M. F. CLEARY, E. J. CLEARY, ADOLPH KEPPLER, J. B. WOODS, RACHEL MERRIMAN, MERTHA McGOWAN, AND ALICE McGOWAN, APPELLEES.

REPLY BRIEF OF APPELLANTS.

I. Under the Statutes of Montana May a Suit be Maintained to Remove Cloud from Title?

The argument of the appellees makes it necessary to again refer to a subject which is discussed to some extent in our brief in chief. The substance

Im

of appellees' argument is that a suit to remove a cloud from title is for all practical purposes the equivalent of a suit brought to determine an adverse claim, under section 6870, Revised Codes of Montana of 1907, and that, therefore, the right to maintain a suit to remove a cloud from title, as it originally existed under the chancery practice, has become merged in the statutory remedy afforded by the said section 6870.

The most serious flaw in the argument of the appellees upon this point is that it ignores the existence of two other sections of the Revised Codes of Montana, to wit, sections 6115-6116, which sections, according to the construction placed on them by the Supreme Court of California, from which State Montana borrowed them, and by the Supreme Court of Montana, in a recent case, expressly provide for suits to remove clouds from title of the same character as was maintainable prior to the adoption of the said section 6870. These sections of the statute are set forth in our brief in chief, on page 5, and provide that a written instrument, in respect to which there is a reasonable apprehension that if left outstanding may cause serious injury, may be adjudged to be void and may be canceled, but that an instrument void upon its face, or upon the face of another instrument necessary to the use of the former in evidence, it is not to be deemed capable of causing such injury.

These sections of the statute appear as sections 3412-3413 of the Civil Code of California, Montana having adopted said sections in 1895 and made them a part of her statutory law by enacting them as sections 4450-4451 of the Civil Code of Montana of 1895. Before such sections had been copied into the statute of Montana, they had been,

on June 11, 1889, construed by the Supreme Court of California, in the case of

Castro *vs.* Barry, 79 Cal., 443,

where, concerning them, it was said:

> "This provision is the embodiment in statutory form of an old and well-settled rule of equity. And as a matter of course, in order to obtain the relief it is necessary that the complaint should state a case within the rule. In the language of Sanderson, J., in Hibernia S. & L. Soc. *vs.* Ordway, 38 Cal., 681, 'In an action to remove a cloud, there can be no question but that the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, ought to be stated.' "

Since Montana adopted this statute, as so construed, the decision of the Supreme Court of California last cited is of equal force with a like decision by the Supreme Court of Montana.

Nelson *vs.* Great Northern Ry. Co., 28 Mont., 297; 72 Pac., 642.

The Supreme Court of Montana, in a recent case (March 28, 1914),

Hicks *vs.* Rupp, 140 Pac., 97,

cited in our brief in chief, expressly declared that the said sections 6115-6116 defined the rule under which the jurisdiction of the court, as a court of equity to remove a cloud may be invoked, and that in an action to obtain the relief which this statute affords it is necessary to allege the facts which show the apparent validity of the instrument which

is said to constitute the cloud, and also the facts showing its invalidity.

The case of—

> Merk *vs.* Bowery Mining Co., 31 Mont., 298; 78 Pac., 519,

was a suit for the removal of a cloud and for the quieting of title. The Supreme Court of Montana, in deciding the case, said that the complaint stated facts sufficient to constitute a cause of action in a suit to remove a cloud, and upon this point cited Wiard *vs.* Brown, 59 Cal., 194, which latter case is cited in our brief in chief, on page 12. An extract there copied from the opinion in that case is to the effect that in the opinion of the court the relief afforded under the statute, section 6115, is the same as was afforded under the equity practice at common law, by way of removal of a cloud from title, and it is clear, therefore, that the statement of the court in Merk *vs.* Bowery Mining Co., *supra,* that the complaint there considered stated facts sufficient in an action to remove a cloud meant that facts were alleged in the complaint showing the actual invalidity as well as the apparent validity of the instrument which was said to constitute the cloud.

The court also said that the complaint in that case stated facts sufficient to determine an adverse claim. We quote from the opinion in that case as follows:

> "An examination of the complaint discloses that it was filed to quiet plaintiffs' title to the premises in controversy, to remove a cloud therefrom by cancellation of instruments which they say have no validity, and incidentally for an injunction against the prosecution of two suits against them

by the Bowery Mining Company for forcible entry and detainer and one for conversion of personal property. There is no doubt but the allegations of the complaint are sufficient as an action to remove a cloud from plaintiffs' title and cancel the contracts of August 15, 1899, and May 9, 1900, to Berkin, under section 4450 of the Civil Code. Wiard *vs.* Brown, 59 Cal., 194; Angus *vs.* Craven, 132 Cal., 691; 64 Pac., 1901. We are of the opinion that it is also sufficient to warrant a decree quieting title of plaintiffs against the adverse claim of the Bowery Mining Company. The complaint alleges that this company is assignee of the Berkin contract, and claims rights thereunder adverse to plaintiff; but it asks in the prayer that defendants 'set forth the nature of their adverse claims, and that the same may be adjudged void.' "

The appellees do not deny that the decision of the Supreme Court of Montana construing the statutes under consideration should, in this case, be deemed of controlling force, or that the decision of this court in—

Moore *vs.* McGuire, 205 U. S., 214,

(cited in our brief in chief, page 25) is not conclusive upon this point. Without any answer on the part of the appellees to our contention as to the effect which should be given to said sections 6115-6116, to the decisions of California and Montana construing the same, and to the decision of this court in the case cited, it is unnecessary to follow at great length the argument of the appellees in support of their contention that under modern statutory enactments the distinction between a suit

under the statute to determine an adverse claim to real property and a suit to remove a cloud from the title of real property is of no practical, but only of an historical, interest.

Appellees say that under the old equity practice a suit to remove a cloud was not maintainable if the instrument sought to be canceled as a cloud was void on its face, or that such suit was not maintainable to secure relief against a mere verbal claim, and that no such suit was maintainable unless the facts showing the actual invalidity as well as the apparent validity of the instrument sought to be canceled as a cloud were specifically alleged, but that under the enlarged equitable powers exercised under said section 6870 the rule is otherwise.

It is true that in a complaint drawn to secure the relief afforded by the said section 6870 it is unnecessary in order that such suit may be maintained that such conditions should exist or that such facts should be alleged. That in a suit in Montana to remove a cloud the rule is otherwise, is entirely clear, because said sections 6115-6116 expressly declare that a suit to remove a cloud from title is not maintainable if the instrument, the removal of which as a cloud is sought, is invalid upon its face, and that such relief is afforded only in respect to written instruments, while the Supreme Court of Montana in Hicks *vs.* Rupp, *supra*, has declared that in suits to remove clouds from title it is necessary to allege specifically the facts showing the actual invalidity as well as the apparent validity of the instrument complained of as casting a cloud.

II. Does the Bill Here Contain the Appropriate Allegations in a Suit to Remove a Cloud?

The appellees say that if it is necessary or permissible, in a suit to remove a cloud from title, to allege the facts showing the actual invalidity as well as the apparent validity of the instrument complained of as casting a cloud, the allegations of the bill in this case show the suit to be of that character, except that it contains the allegation "that said defendants have not, and none of them has, any right, title or interest, either at law or in equity, in or to said lands or any part thereof;" and contains a prayer that the title of the complainants be quieted.

But we submit that the allegation that the defendants have no right, title or interest in the lands in question, which follows the allegation of facts showing the actual invalidity of their claims to the same, is a mere general conclusion added to such specific allegation of fact. In a suit to remove a cloud such allegation is, at most, only superfluous. In a suit under the statute to determine an adverse claim such allegation is entirely superfluous, and to the cases to that effect, cited on page 13 of our brief in chief, may be added:

Merk *vs.* Bowery Mining Co., *supra.*

Such allegation, therefore, in no way leads to the conclusion that the complainants have chosen to pursue the remedy afforded by the said section 6870, rather than that afforded by said sections 6115-6116.

The prayer of the bill may be looked to, no doubt, for the purpose of determining the theory upon which the complainants have proceeded. The prayer is that a decree be entered "that the cloud

caused by the recording of the said declaratory statements of location and certificates of location in the office of the county clerk and recorder of Silver Bow County, Montana, and each and all of them, be removed, and the same decreed to be no cloud upon the title of the complainants in and to the said premises."

The relief sought shows that the complainants filed their bill for the purpose of procuring the removal of such clouds, and it is immaterial that they have also asked that their title be quieted.

If the allegations of the bill and the prayer were sufficient to entitle the complainants to relief under both the said section 6870 and the said sections 6115-6116, the suit would not on that account be any less a suit to remove a cloud, and the appropriate allegations of a suit of that character would be sufficient, if they showed the existence of a Federal question, to give jurisdiction without regard to diversity of citizenship.

In—

Merk *vs.* Bowery Mining Co., *supra,*

the complaint was held sufficient to constitute a cause of action under the said sections 6115-6116, as well as said section 6870, and in—

Moore *vs.* McGuire, *supra,*

it was held that the suit was one to remove a cloud as well as a suit to quiet title, and the allegations of the bill in that case, for the purpose of showing the actual invalidity of the deeds under which the defendants claimed, were held to be sufficient to show that the case required the construction of an act of Congress.

III. Must the Federal Question Necessarily Appear from the Plaintiff's Statement of His Own Claim?

By placing certain words in italics. in phrases quoted from cases where there was a futile attempt to show the existence of a Federal question, by anticipating defenses which would or might be interposed, the appellees intimate, rather than expressly declare, that the question asked above should be answered in the affirmative. The statement of the law in any case must be interpreted with reference to the facts there under consideration. In order to obtain an answer to the question propounded above, it is necessary, therefore, to go to cases where, in order to make out a case on the part of the complainant, it was necessary to allege that the defendant made certain claims and such allegations were held to show the existence of a Federal question.

Moore *vs.* McGuire, *supra,* cited in our brief in chief, page 25;
Crystal Springs Land and Water Co. *vs.* City of Los Angeles, 76 Fed., 148;
City Railway Co. *vs.* Citizens' Railway Co., 166 U. S., 557, and
Railway Co. *vs.* Ziegler, 167 U. S., 65,

cited in our brief in chief, on page 33, are cases of that character.

To the list the following may be added:

Railway Co. *vs.* Los Angeles, 194 U. S., 112; 48 L. Ed., 896;
Columbia Valley Ry. Co. *vs.* P. & S. Ry. Co., 162 Fed., 603;
Cooke *vs.* Avery, 147 U. S., 375; 37 L. Ed., 209.

A Federal question must necessarily arise and that must be shown by the material allegations of the complainants' bill, but that does not mean that a Federal question must necessarily be decided.

A lengthy array of decisions of this court, directly in point and so stating the rule, are cited in our brief in chief, on pages 53 to 55, inclusive.

There being no remedy at law, the choice is given to the complainants to proceed under the said sections 6115-6116 or under the said section 6870. Having chosen to proceed under the former, the sufficiency of the bill must be determined by the language of those sections as construed by the Supreme Courts of California and Montana, and if the allegations of the bill, by those decisions, declared to be necessary in order to procure the relief afforded by those sections, show that the decision of the case involves, in any aspect which it may assume, the decision of a Federal question, the case must be held to be one arising under the laws of the United States, and it is utterly immaterial that the complainants might have procured, by proceeding under the said section 6870, substantially the same relief.

IV. Does it Appear from the Necessary Allegations of the Bill that the Decision of the Case May Require a Determination of the Extent of the Area of Surface Ground which May be Embraced in a Lode Location Made Within the Limits of Ground Patented as Placer?

Appellees, in urging that this question should be answered in the negative, have made two points:

(*a*) They say that the relief is by cancellation, and that if the area embraced in the location is greater than that which the law permits, the loca-

tion on that account is not rendered invalid as an entirety, and that, therefore, the location certificate cannot be canceled, because it cannot be canceled in part and left standing as to the remainder. They cite Latham *vs.* Inman, 88 Ga., 505; 15 S. E., 8.

8. The court in that case held that the deeds which were the subject of controversy were valid as to an undivided one-half interest, and therefore declined to grant the relief which was sought, namely, that such deeds be delivered up and canceled. This was not done, however, without the remark in passing that the plaintiff might be entitled to other relief.

In this case the cancellation of the certificates is not prayed for in the bill. The prayer is, that the cloud caused by the record of such certificates be removed, and that such certificates be decreed to be no cloud upon the title of the complainants. If the certificates are void in part, to the extent that they are void, there is clearly no difficulty in granting the relief which the appellants pray, or at least in granting some appropriate relief under the general prayer. The relief which the said sections 6115-6116 provide is not only the cancellation of invalid instruments causing injury, but said sections also provide that such instruments may be declared void, and if such instruments are valid in part the court may, of course, declare them void only to the extent that they are so.

We may say here, in passing, that the bill not only alleges that the locations of defendants are each 1,500 feet by 600 feet in size, but that defendants claim the entire area so located. If defendants should be able to show themselves entitled to some area, there is no reason why the locations should not be declared void as to the excessive area.

(*b*) Appellees say, however, that the certificates of location cannot be declared to be void in part, for the reason that if they are void in part such invalidity appears upon the face of the certificates, and therefore a suit for the removal of a cloud is not the appropriate remedy.

The contention is without force. If such location certificates are valid in part, but are invalid in part, because a greater area is embraced in the location than is allowed by law, the fact of such invalidity not only does not appear on the face of the certificates of location, but it does not appear upon the face of the record, assuming that such record also shows the placer patent which is the source of complainants' title, because the extent of area which may be covered by such certificates does not appear upon the face of the record. It does appear that the lode locations are made within the exterior limits of ground patented as a placer mining claim, but the record does not show whether the placer patent is claimed to be void *in toto* on account of a prior location of the same ground, valid and existing at the date of the issuance of the placer patent, and that the land embraced in the placer patent, and all of it on that account is still open to location, or whether a certain vein or veins with an area of enclosing surface ground is claimed to have been excepted from the grant, made by such placer patent because of the known existence of such vein or veins at the date of the application for such placer patent.

The question of the extent of the area which may be embraced in such lode location involves the question also of the distance along the strike of the vein which may be located. It is the appellants' contention that a vein, if known to exist, is only subject to location to the extent that it was actually exposed at the date of the placer application; and,

of course, what portion of the vein was so exposed at such date in no place appears of record.

Before reaching a consideration of the extent of area of surface ground which may be embraced within a lode location, within the limits of ground patented as placer, the court will be called upon to determine, or at least may determine, the question whether or not the prior location of the ground covered by the Butte & Boston placer patent is not rendered of no effect on account of the decisions rendered in the adverse suits set forth in the complainants' bill. If such prior locations must be deemed to be void *ab initio*, because of the judgments rendered in such cases, then the land cannot, because of such prior locations, be held to be subject to location after the issuance of such patent, as pointed out in our brief in chief. The determination of that point involves the decision of a Federal question, and the court having held that such was the effect of such decisions, and passing to a consideration of the question as to whether or not any viens were excepted from the grant contained in the placer patent, because of their known existence, may hold that such question is concluded by the decisions in such adverse suits, and in doing so will, as is also pointed out in our brief in chief, determine another Federal question. If the contention of the appellees, under (*a*) and (*b*) above, should be accepted by the court, it does not necessarily follow, therefore, that the case is not one involving a Federal question in its decision.

V. Since the Bill Alleges that No Vein or Lode Within the Meaning of the Terms as Used in Section 2333, R. S. U. S., was Known to Exist Within the Butte & Boston Placer Mining Claim at the Date of the Application for Patent, Does it Necessarily Follow that Appellees, in a Suit Brought by Them to Recover Possession of the Land Embraced Within Their Lode Locations, Must "Inevitably" Show Such Fact?

The appellees contend that since the allegations in the bill negative the existence of such fact, and since all facts properly pleaded in the bill are, for the purposes of the motion to dismiss, deemed to be true, that should the lode claimants bring a suit based upon their locations, they could only recover by showing that the land embraced in their locations was subject to location, and this they must inevitably fail to do, because there was in fact no vein known to exist, at the date of the placer application, within the ground covered by it.

The contention of the appellees is unsound for two reasons: In the first place, the bill alleges that the defendants claim that such land is subject to location not only by reason of the known existence of such veins, but by reason also of its having been covered by prior valid existing locations at the date of the issuance of the placer patent, and the lode claimants would not, therefore, necessarily be required to show the known existence of veins in order to recover. The allegations of the bill do not negative the existence of such prior valid locations, but certain judgments are alleged as avoiding their effect. The fact that it is alleged in the bill that no vein or lode, within the meaning of said section 2333, was known to exist does not necessarily mean that there could not have been a location. A vein might exist sufficient to support a valid lode location made prior to the date of the location of the

ground as a placer claim, but such vein might not be a known vein within the meaning of said section. That this is so appears from the opinion in

Mason *vs.* Washington-Butte Mining Co., 214 Fed., 32,

where two decisions by this court are quoted from to the same effect.

And of course, too, such prior locations might have been based upon discoveries made outside of the limits of the Butte & Boston placer, but so located as to embrace the ground included in it.

In the second place, it can only be said that a party claiming under an instrument which is sought to be canceled as a cloud must, in order to recover upon such instrument, necessarily offer evidence inevitably showing its invalidity where the instrument in question depends for its validity upon some other instrument necessary to be offered in evidence in its support.

A tax deed, unless made *prima facie* evidence of the regularity of the proceedings upon which it is based, requires proof of such proceedings in order to entitle the holder of the deed to recover upon it, and if the property sought to be subjected to the assessment is insufficiently described on the assessment books, that is a fact, of course, which must inevitably be shown.

The correctness of our contention on this point will clearly appear by referring to the cases cited in support of the rule in

32 Cyc., 1315.

A case in which an application of the rule is made is

Simmons *vs.* Carlton, 33 So., 408,

from the opinion in which case we quote the following:

> "In the case of Clem *vs.* Meserole, 44 Fla., —; 32 South., 815, it is held that in actions involving title under execution sale the holder of such title cannot introduce in evidence his deed or the execution without also introducing the record of the judgment, if insisted upon by the adverse party. This being so, it necessarily follows that the appellant could not maintain in a court his title to the property purchased at the sheriff's sale without introducing evidence, to wit, the record of the judgment, upon production of which it would inevitably appear that the judgment emanated from the county court; and therefore, if it be true, as contended by appellee, that a circuit court execution cannot be issued upon a county court judgment a transcript of which has been filed in such circuit court, his own proof would show that his title is invalid."

A vein can only be held to be known to exist, within the meaning of said section 2333, when it is of sufficient value to justify exploitation and development. Whether such vein had such value at the date of the placer application, and, indeed, whether that which is claimed as a vein is in fact a vein at all, is a question which may be proved by the testimony of witnesses as to their opinions (the witnesses being qualified to give an opinion on such subject), and, of course, the opinions of different witnesses will, ordinarily, not be the same. Evidence, undoubtedly, could be produced to show that a vein was of sufficient value to justify exploitation, although such was not the fact, and the existence of the fact does not preclude the possibility of the production of such testimony.

Except for the matters considered under points

I, II, III, IV, and V, nearly all of our contentions in our brief in chief are conceded. Conceding such contentions, appellees argue, however, under two principal heads, that the decree of the court below should be affirmed.

Passing to the first of these points, we are led to the question:

VI. Are Certificates of Lode Locations, under the Montana Law, Such Instruments as Will Support a Suit for Their Removal as Clouds upon Title?

The appellees base their contention that such question should receive a negative answer on the authority of two cases, namely, Lehman *vs.* Roberts, 86 N. Y., 232, and Scott *vs.* Onderdonk, 14 N. Y., 9, and the construction placed by appellees on the language employed in 32 Cyc., 1315.

The rule by which the question is to be determined is stated in

32 Cyc., 1314,

as follows:

> "A cloud, such as equity will undertake to remove, is the semblance of a title, either legal or equitable, or a claim of an interest in lands appearing in some legal form, but which is in fact unfounded, and which it would be inequitable to enforce."

A perfected mining location is held under a legal title as against every one save the United States. From

3 Lindley on Mines, 3d ed., sec. 773,

we quote:

> "Under the mining laws, the tenure by which the estate of the miner is held pos-

> sesses the attributes of a fee, as against everyone save the Government. Ejectment may be maintained upon an unpatented mining title. When perfected under the law, a mining location is held under a legal title as against everyone save the paramount proprietor."

The declaratory statements of location and the certificates of location, Exhibits B to J, annexed to the complainant's bill, are all in due form, and upon the face thereof are legally sufficient, all set forth the making of a sufficient discovery, and that the location described therein was made for the purpose of securing the benefit of the laws of Montana governing the manner of locating, *et cetera*, of mining claims. Such instruments, therefore, if the locations referred to therein, on account of facts not appearing of record, are in fact invalid, come clearly within the rule stated, and are claims of an interest in lands appearing of record in legal form, but which claims are in fact unfounded.

The argument of appellees is based upon the qualification of the above rule, stated in 32 Cyc., 1315, as follows:

> "Equity will not interfere to remove a cloud on title where the invalidity of the instrument or claim complained of appears on its face; *where extrinsic facts must be proved for the purpose of establishing its validity;* or where the party claiming under it must, in order to recover thereon, necessarily offer evidence inevitably showing its invalidity and destroying its effect."

The particular clause relied upon by the appellees, we have placed in italics.

Passing for the moment the question of whether the qualification to the rule is correctly stated, we submit that the language does not warrant the interpretation given it by the appellees.

In undertaking to apply the language to the facts of this case, appellees have interpreted it as meaning that equity will not interfere when a claim appearing of record and valid on its face requires proof of extrinsic facts for the purpose of enforcing it; and the appellees, while claiming that though a certificate of location, under the Montana law, if in due form, is *prima facie* evidence of every fact necessary in order to show a perfected location other than the making of a discovery, contend that since extrinsic proof is necessary to show the fact of a discovery a court of equity will not grant relief by way of declaring such certificates to be void, notwithstanding that while they remain of record the true owners will not be able to find a purchaser for the land affected by them, and notwithstanding the fact that since the question whether or not the veins, made the basis of such locations, were known to exist on May 11, 1891, the date of the application for the patent which was issued to the complainant's predecessors in interest, is determinative of the question whether or not the land upon which such locations were made was open to location at the date of the making of such locations, and such question can only be settled by the testimony of witnesses acquainted with the land in question on that date, the rights of the complainants are liable to be entirely lost on account of the death or change of residence of the persons upon whom they must rely to rebut the testimony which may be produced by the lode claimants.

A correct interpretation of the language of the text quoted is, that equity will not give relief by way of removal of a cloud where the instrument

complained of as casting a cloud, or the record which must necessarily be put in evidence to support it, appears on its face to be invalid, and extrinsic evidence is necessary to contradict such apparent invalidity.

Scott *vs.* Onderdonk, *supra*, was a suit to enjoin the issuance of a tax deed upon the ground that there had been no valid levy of the tax upon which such proceedings were based. The injunction was granted upon the theory that the tax deed when issued would be *prima facie* evidence of the regularity of all prior proceedings. In considering the case, however, the court discusses the case as it would be presented if the tax deed was not evidence of the regularity of any prior proceedings, and in that portion of the discussion is to be found the qualification to the rule, which is stated as follows:

> "If, however, the claim is based upon a written instrument which is void upon its face, *or which does not in its terms apply to the property it is claimed to affect*, there seems to be no reason for entertaining a litigation respecting it."

The gist of the rule appears in the clause which we have placed in italics.

If the instrument upon its face applies to different property from that in question, and can only be shown by extrinsic evidence to apply to such property, the instrument belongs to the same class as an instrument apparently void upon its face.

The portion of the opinion in Scott *vs.* Onderdonk, *supra*, quoted on page 19 of appellees' brief, is as follows:

> "The same reason applies to cases where the claim requires the existence of a series of facts or the performance of a succession

> of legal acts, and there is a defect as to one or more of the links. Van Doren *vs.* Mayor, 9 Paige, 388; Mayor *vs.* Merserole, 26 Wend., 132."

Van Doren *vs.* Mayor was a suit to enjoin the collection of certain assessments levied upon real property. A demurrer to the bill was sustained on the ground that the invalidity of the assessment appeared upon its face and that, therefore, a deed which might be given to a purchaser at a sale of such land to enforce the collection of such assessment, could not be proved except by proof also of such invalid assessment, and for that reason such deed would not constitute a cloud.

Mayor *vs.* Meserole, *supra*, was a case of the same character, and was disposed of upon the same theory.

The learned judge had in mind, it is clear therefore, when the language last quoted was used, a case like that of a deed issued by a sheriff in pursurance of a sale under an execution issued upon a void judgment, and it being necessary, in order to recover under the deed, to put in evidence all of the antecedent proceedings upon which it was based.

That is a case where the claim requires the performance of a succession of legal acts, and there is a defect as to one of the links.

The case of Lehman *vs.* Roberts was a suit brought by Aaron Lehman against Edward Roberts to enjoin the enforcement of a decree of foreclosure entered in a suit to foreclose a mechanic's lien brought by Edward Roberts against James Hill.

At the time such decree of foreclosure was entered, James Hill was not the owner of the property and did not appear to be so by the record, and

the decree of foreclosure was a decree merely for the sale of the interest which James Hill had in the property. As James Hill had no interest in the property, it did not appear upon the record that the decree of foreclosure was of any validity. It could only be shown to be valid by going beyond the record and showing that while the title on the face of the record stood in the name of some other person, the property was in fact owned by James Hill, against whom the decree of foreclosure was rendered. The court in holding that such a decree does not constitute a cloud, such as a court of equity will remove, took occasion to remark that an action to remove a cloud from title can only be maintained where the pretended title, which is alleged to constitute the cloud, is apparently valid on its face.

Stokes *vs.* Houghton, 45 N. Y. S., 21,

was a suit to have declared void a mortgage which it was alleged had ceased to be of any validity. When originally given, it was to secure the mortgagee from liability on account of his becoming surety for certain receivers in an action brought by the plaintiff, the mortgagor, but that any further liability upon such bond had ceased, the receivership proceedings having been discontinued and an order made canceling the bond and discharging the sureties.

In defense of the suit, it was argued that since the mortgage recited the receivership proceedings and the record showed that the receivership proceedings had terminated, the case was within the rule as stated in Scott *vs.* Onderdonk, *supra*.

In deciding against the validity of such defense, the court in referring to that case said:

> "The former (referring to Scott *vs.* Onderdonk and similar cases) dealt for the

> most part with leases or other instruments in the chain of a tax title; they were either void upon their face or defective for the lack of additional proceedings necessary to give them validity."

A tax deed, if not *prima facie* evidence of the regularity of prior proceedings, would belong to the same class as the cases cited in Scott *vs.* Onderdonk, *supra*.

In all of these cases it is to be seen that the record necessary to support the claim made under the instrument in question upon its face showed that such instrument was invalid, while with reference to the certificates of location, here considered, there is nothing in the record to show any invalidity or imperfection whatever.

The authorities, however, do not all support the rule stated in the cases relied on by appellees.

Pixley *vs.* Huggins, 15 Cal., 128.

A consideration of some of the cases in which relief has been granted, by canceling certain instruments as clouds upon title, will show very clearly the error of appellees in the construction which they place upon the qualifications of the rule stated in 32 Cyc., 1315.

The laws of most of the States give a lien to persons performing labor or furnishing material for the construction of a building, or other improvement on real estate.

In order to obtain the benefit of the law, it is necessary for the lien claimant to make and file in some designated office a claim of lien, in which is required to be set forth a statement of the account for labor done or material furnished; but the claim of lien, so filed, is not *prima facie* evidence of the performance of such labor or of the furnishing of such material, or of any other fact, except the mere

fact of the filing of such lien claim. Though the account embraced in such claim of lien be untrue in fact, and no labor has been done or material furnished, it would nevertheless constitute a cloud upon the title of the property affected by it, contrary to the statement of the qualification of the rule made by appellees, for the lien claim requires for its validity the existence of a series of facts, and the existence of one of such necessary facts would, in the case we have supposed, be wanting.

So mortgages and all other lien claims of every description, according to a well-established rule, if valid upon their face but invalid on account of extrinsic facts (though appellees' contention would require a contrary rule), are held to be clouds upon title, which equity will remove.

32 Cyc., 1319 to 1321.
Sheets *vs.* Prosser, 112 N. W., 72.

In

Moore *vs.* McGuire, *supra,*

the validity of the tax deeds in question could only be shown to be valid by showing that the land in question was in Mississippi, which was a matter which could only be shown by parole evidence as to the course of the main channel of the Mississippi River.

The whole contention of appellees upon this point, however, is based upon the contention that the certificate of location is not *prima facie* evidence of a discovery. According to a well-settled rule, however, such certificates will, by the mere lapse of time, become *prima facie* evidence not only of a discovery, but of a valid location.

Cheesman *vs.* Shreeve, 40 Fed., 787.
Cheesman *vs.* Hart, 42 Fed., 98.
Vogel *vs.* Warsing, 146 Fed., 949.
Thomas *vs.* South Butte Mining Co., 211 Fed., 105.

If the certificates of location in question here are not now *prima facie* evidence of a discovery and of a valid location, all that is required to enable them to have that effect is, that they should merely be allowed to stand unchallenged, and if time will give them that effect, they must at the present time be deemed to be clouds upon title.

In

> Acord *vs.* Western Pocahontas Corporation, 156 Fed., 989,

in the course of the opinion it is said:

> "And, further, any pretended conveyance which, if left undisturbed, may ripen into a perfect title, must necessarily create a cloud upon the true title."

Now, it is well settled that the jurisdiction in this class of cases is preventive as well as remedial.

Many authorities are cited in our brief in chief, pages 15 to 17, to that effect.

The bill in this case, therefore, is sufficient to invoke the equitable jurisdiction of the court, whether the certificates of location are or are not ordinarily *prima facie* evidence of a discovery, for they will be removed as clouds if they will, if undisturbed, ripen into clouds.

It will be remembered, however, that in

> Hicks *vs.* Rupp, *supra*,

the Supreme Court of Montana said concerning said sections 6115-6116: "These provisions taken together clearly define the rule *with its limitations* under which the equitable jurisdiction of the court may be invoked."

The italics are ours.

If the statute not only defines the rule but fixes the limitations upon it, then we only have to look to these sections of the statute to determine

whether or not the limitations upon the rule exist for which the appellees contend. As they are not to be found in the statute, under the decision last referred to, they must be held not to exist.

VII. Does the Bill Show that the Question of the Extent of the Conclusiveness of the Judgments Rendered in the Adverse Suits Requires the Determination of a Federal Question?

The appellants contend (brief in chief, pages 42 to 45, inclusive) that because of the judgments rendered in the adverse suits, pleaded in the bill, regardless of what the actual facts were, the Point Pleasant and Pleasant View lode claims, which were prior to the Butte & Boston placer location and covered in part the same ground, must be held to have been void *ab initio*, and insufficient to present any obstacle to the issuance to the subsequent locators of patent for the said Butte & Boston placer.

The bill alleges that the defendants claim, that by reason of such prior lode locations the patent for the Butte & Boston placer was rendered void as to the ground in conflict. The argument was made by the same solicitors who appear here for the appellees, in the case of Mason *vs.* Washington-Butte Mining Co., 214 Fed., 32 (their argument being based on Belk *vs.* Meagher, 104 U. S., 279; Noyes *vs.* Mantle, 127 U. S., 348; Brown *vs.* Gurney, 201 U. S., 184, and Farrell *vs.* Lockhart, 210 U. S., 142); that mineral ground covered by a valid location is, during the life of the location, segregated and not open to location by another; that the Point Pleasant and Pleasant View lode claims were prior to the location of the Butte & Boston placer claim, and were valid and existing

at the date of the issuance of the Butte & Boston placer patent and that notwithstanding the judgments in the adverse suits the Butte & Boston placer location must have been void from the beginning, and the patent for said claim, to the extent of the ground in conflict, was also void.

Appellees now make the contention, as we understand them, that the question in this case, as to whether or not such prior lode locations did have that effect, is not sufficient to raise a Federal question, because, as they claim, the question has been settled by the decision of this court in the case of Clipper Mining Co. *vs.* Eli M. & L. Co., 194 U. S., 220; which was an adverse suit brought by the owners of a placer mining claim against an application for patent for a lode claim within the exterior boundaries of the placer location. Prior to the application by the lode claimant for a patent, the owners of the placer claim had made application for patent, and such application had been rejected. Notwithstanding such action by the Land Department, the District Court of Lake County, Colorado, in which court the adverse suit was brought, found as a fact that at the date of the lode location the placer location was valid and existing. In affirming the judgment, which was in favor of the placer claimants, this court took occasion to remark that such judgment could not conclusively determine which of the parties was entitled to patent, and that the United States was not a party to such adverse suit.

The language of the court upon this point, which we quote here, was as follows:

> "We must not be understood to hold that, because of the judgment in this adverse suit in favor of the placer claimants, their right to a patent for the land is settled beyond the reach of injury by the Government, or

that the judgment necessarily gives to them the lodes in controversy. In 2 Lindley on Mines, sec. 765, the author thus states the law:

"'Notwithstanding the judgment of the court on the question of the right of possession, it still remains for the Land Department to pass upon the sufficiency of the proofs, to ascertain the character of the land, and determine whether or no the conditions of the law have been complied with in good faith.'"

In order to give the decision of the court in that case the effect that appellees claim for it, it must have been a decision squarely in point upon the question whether or not the existence of the prior lode locations would render the Butte & Boston placer void as to the ground in conflict, taking into account the fact of the rendition of the judgments in the adverse suits.

Is it the argument of the appellees that, because of the decision of this court in the Clipper Mining Co. case, it must be held that proof of the existence of such prior lode locations will render the Butte & Boston placer void as to the ground in conflict, notwithstanding the decisions in the adverse suits? If they intend to so argue, it is evident that they have overlooked the fact that the decision in the Clipper Mining Co. adverse suit was in favor of, and not against, the prior location. Had the decision of the lower court been in favor of the subsequent lode location and the lode claimant had proceeded under such judgment and had procured a patent, and had some third party attempted subsequently to make a location of the same ground on the theory that the subsequent lode location was rendered void because of the existence, at the time

of the making of such location, of a prior valid existing location covering the same ground, and had the question been presented to this court whether or not it was open to such third party, notwithstanding such judgment in the adverse suit, to make proof of the existence of such prior location for that purpose, then the decision of this court must have been considered as settling one of the questions presented here as to the extent of the conclusiveness of the judgments rendered in the adverse suits.

It is true that this court said the United States was not a party to the adverse suit. The Circuit Court of Appeals for the Ninth Circuit said the same thing, but at the same time held that the judgments in the adverse suits, which we have pleaded, did have the effect of rendering the prior locations void *ab initio*, and in doing so found it necessary to construe section 2326, R. S. U. S., as appears from the opinion in Mason *vs.* Washington-Butte Mining Co., *supra*.

The appellants also contend that, regardless of what the facts may have been, it is not now open to the appellees to say that a vein was, or veins were, known to exist within so much of the Butte & Boston placer as was in controversy in the said adverse suits at the date of the application for the said placer patent, because that was a question which was necessarily involved in the adverse suits and was determined by the judgments rendered in them, and while the United States was not, strictly speaking, a party to such suits, it was, as was said by the Supreme Court of the State of Montana in the case of—

> Wilson *vs.* Freeman, 29 Mont., 470; 75 Pac., 84,

a *quasi* party to such suits, and was, to such an extent, a party, that persons subsequently attempting

to acquire title from the United States by the location of a vein, upon the theory that the same was known to exist at the date of the placer application for patent, must be held to have been concluded by the decision in such adverse suits. This question cannot be held to have been settled by any decision by this court until a case is presented to it involving the same question; and it is not sufficient that this court may have said, in a case based upon an entirely different state of facts, that, strictly speaking, the United States is not a party to an adverse suit. What is necessary in order to settle that question is that it must have said, in a case involving the same facts, that the United States is not to any extent, in any sense, or for any purpose deemed to be a party to such suit. The appellants do not contend that patent must necessarily be issued to the prevailing party in an adverse suit. They do contend that as between the parties to such suit the Land Department cannot determine that the one against whom judgment was rendered was entitled to the possession; and, so far as the question of possession is concerned between the parties plaintiff and defendant to the adverse suit, the United States is bound by the decision in such suit.

As to either one or both of our contentions with respect to the extent of the conclusiveness of the judgments rendered in the adverse suits, the decision may be either for or against us; but however the questions are decided the construction of certain statutes of the United States will be necessary.

The appellees say, however, that judgments in the said adverse suits have not been pleaded by us with sufficient certainty. They say that the cause of action here is not the same as the cause of action in the adverse suits, and that the decision of the adverse suits is not conclusive as to any question

which may have been, but which was not, actually passed upon in those cases.

Our answer to the contention is that since an issue is tendered by the bill here which requires a determination of the question of the known existence of a vein or veins within that part of the Butte & Boston placer which is involved in the controversy in this case at the date of the application for such placer patent, and since it clearly appears by the allegations of the bill that the same issue was presented in the adverse suits, and, further, since the decision of the question of the known existence of the said vein or veins was necessarily involved in the said adverse suits the judgments pleaded could not have been rendered without deciding such question, it must be held that such question is not one which merely may have been decided in such case, but it must be held to have been actually decided.

It appears from the bill that the ground there described was embraced in two lode locations, known respectively as the Point Pleasant and Pleasant View lode claims, which lode claims were prior to the location of the Butte & Boston placer; that such lode claimants filed in the United States Land Office, in due time, two adverse claims to the application of the placer owners for a patent; that such adverse claims were in due form, and by the same the lode claimants asserted adversely to the applicants for the said patent a claim of the right of possession to so much of the land embraced in the application for patent as was in conflict with the said lode claims, and that the ground described in the bill is embraced within the ground which was so in conflict; that within due time after the filing of said adverse claims an adverse suit was filed by the said adverse claimants, with respect to each of the said adverse claims, in the Montana Second Judicial District Court, a court of general juris-

diction; that the complaint in each of the said suits was in due form of law to determine the right of possession as to the land embraced in said adverse claims; that the said applicants for patent, the defendants in said suits, filed an answer in each of said suits; that the said suits were regularly heard and determined, and a decision and judgment given and made in each of them in favor of the defendants; that a certified copy of the judgment-roll in each of said suits was filed in the United States Land Office, for the proper district, together with the requisite description and certificates of the Surveyor General, whereupon the said proceedings and the said judgment-rolls being certified to the Commissioner of the General Land Office, the said patent was issued in conformity with the said judgments.

Concerning the character of an adverse suit, the following extract is from

3 Lindley on Mines, 3d ed., sec. 754:

> "The proceedings are said to be purely statutory, and have their inception not in the court in which the suits were commenced, but in the land office.
>
> "The object of the action is not, strictly speaking, to determine the title to real estate, because the fee resides in the Government. The true question for discussion is which of the contending parties has complied with the requirements of the law and is prior in time. In other words, in whom is the present right of possession?
>
> "It is not sufficient that one party should establish a better title than the other, but the prevailing party must show clearly a valid right of possession based on a compliance with the mining statutes.
>
> "In suits of this character the United

States has been said to be a *quasi* party, and if neither plaintiff nor defendant is entitled to a patent, the court must so find. * * *

"If both fail to establish such right of possession in court, neither can recover; so that each must rely upon the strength of his own title, and not on the weakness of his adversary. Each party is practically a plaintiff and must show title."

The appellees rely upon 2 Black on Judgments, sec. 609.

From

2 Black on Judgments, sec. 613,

we quote the following:

"The rule stated in the preceding section cannot be fully comprehended and accurately applied unless we take into account the very important distinction between possible or probable inferences from the judgment and the necessary conditions to the adjudication. Necessary and inevitable inferences—facts without which the judgment could not have been rendered—are equally covered by the estoppel as if they were specifically found in so many words. 'The estoppel is not confined to the judgment,' says the Supreme Court of Massachusetts, 'but extends to all steps involved in it as necessary steps or the groundwork upon which it must have been founded. It is allowable to reason to back from a judgment to the basis upon which it stands, upon the obvious principle that, where a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion.'"

From

10 Enc. U. S. Supreme Court Reports, 738,

we quote as follows:

> "It is well settled that the estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even though there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to *any essential fact* or question in the one action is conclusive between the parties in all subsequent actions, so long as the judgment in the first suit remains unmodified."

The italics are ours.

From

10 Enc. U. S. Supreme Court Reports, 769,

we quote as follows:

> "The above principle as to the conclusiveness of a judgment in subsequent controversies between the same parties, has been applied to * * * the legality of the location of a mining claim."

In

Last Chance Mining Co. *vs.* Tyler Mng. Co., 157 U. S., 683; 39 L. Ed., 859,

the question was presented as to the conclusiveness of a judgment rendered in an adverse suit. The

Tyler lode mining claim and the Last Chance lode mining claim were in conflict to the extent of a triangular piece of ground, shown in the diagram on page 685 of 157 U. S.; the owner of the Tyler claim made application for patent, which application was, to the extent of the said area in conflict, adversed by the owner of the Last Chance claim, and the owner of the Last Chance claim then brought suit, in a court of competent jurisdiction, to determine as between the parties the right of possession to the said area in conflict, in which suit the owner of the Tyler claim appeared and filed an answer. While the adverse suit was pending, the owner of the Tyler claim amended his application to purchase in the land office by excluding therefrom a rectangular piece of ground which included the triangular area in conflict; and when the adverse suit came on for trial he withdrew his answer in the case and a judgment was rendered in favor of plaintiff, the owner of the Last Chance claim. The owner of the Tyler claim obtained patent for the whole of that claim, excluding the rectangular area which had been excluded by the amendment to the application to purchase, and the owner of the Last Chance claim obtained a patent. Suit was brought for the purpose of determining the ownership of an ore body, which lay beneath the surface of the Last Chance claim and in that portion of a vein, the apex of which passed through both of the end lines of the Tyler claim, which lay within vertical planes drawn downward through the end lines of that claim, and which ore body also lay in that portion of the same vein, the apex of which vein passed through the side lines of the Last Chance claim, which lay between vertical planes drawn downward through the side lines of that claim, and the right to the ore body therefore depended upon the priority of location as between the two claims. The situation will be readily un-

derstood by referring to the diagram on page 685 of 157 U. S.

On the first trial of the suit in the Circuit Court for the District of Idaho, the judgment in the adverse suit was admitted in evidence. On appeal to the Circuit Court of Appeals for the Ninth Circuit, the decision of the Circuit Court was reversed, and it was held that such judgment was improperly admitted. A retrial was had in the Circuit Court and a second appeal to the Circuit Court of Appeals, and from the decree there rendered the case was brought into this court by certiorari, where it was held by this court that such judgment was properly admitted in evidence. Concerning the point, Mr. Justice Brewer, in delivering the opinion of the court, said:

> "The defendants by the proceedings which they initiated in the land office compelled the plaintiffs to institute a suit in a court of competent jurisdiction to enforce their rights. After such suit has been commenced and the defendants have been made parties thereto, and the court has proceeded to judgment, will the defendants be heard to say that that judgment amounts to nothing? We are clearly of the opinion that this cannot be tolerated, that the judgment was in all respects regular, that it was conclusive as to the particular ground in controversy, and *binding by way of estoppel as to every fact necessarily determined by it*, and that priority of location was one fact so determined." (The italics are ours.)

The claim or demand in that suit was not the same as in the previous adverse suit between the same parties. The triangular piece of ground referred to above was in controversy in the adverse

suit, while an ore body, under an entirely different piece of ground and in a vein which did not apex in such triangular piece of ground, was in controversy in the second suit.

In—

> Northern Pacific Railway Co. *vs.* Slaght, 205 U. S., 134; 51 L. Ed., 742,

which was an action of ejectment brought by the plaintiff in error against the defendants in error in the Superior Court of Whitman County, Washington, the question was presented as to the conclusiveness of a judgment between the same parties previously rendered in an action between them to quiet title. The plaintiffs in error sought to avoid the conclusiveness of such former judgment on the ground that the question involved in the second suit was different from that which was actually passed upon in the first suit, and that the effect of the judgment rendered in the first suit was only to decide against the title specially set forth in the pleading in that case.

This court, in deciding that the matter was concluded by the judgment rendered in the former suit, said:

> "This doctrine has illustrations in suits to quiet title. It was decided in Lessees of Parrish *vs.* Ferris *et al.*, 2 Black, 606; 17 L. Ed., 317, that the judgment in an action to quiet title is conclusive of title, whether adverse to the plaintiff in the action or to the defendant."

For the purpose of showing that the prior lode locations did not, after the rendition of the judgments in the adverse suits, present any obstacles to the issuance of a patent to the subsequent placer claimants, it was only necessary to show that the judgment was regularly rendered by a court of

competent jurisdiction, in an adverse suit, involving a controversy between the lode claimants on the one hand and the placer claimants on the other, affecting their rights of possession. Whatever effect such judgments had as against the claim of a valid prior location of the ground included in the placer patent, they had because it had been determined in the adverse suits that the right of possession was in the placer claimants.

The claim of the appellants, that such judgments are conclusive upon the question of the known existence of a vein within the ground in conflict, is based on the fact that it was determined in the adverse suits that there was no vein known to exist within such ground, and that as between the same parties that question is concluded whenever it is again brought in issue.

There is no question here but that the parties now before the court are in privity with the parties to the adverse suits. That is conceded by appellants' contention that the former judgments are not sufficiently pleaded. Now, since the present parties are in privity with the parties in the adverse suits, and since one of the questions in this case is the question of the known existence of such veins, it is only necessary, in order to show that the judgments in the adverse suits are conclusive, to show that the same question was necessarily decided in those cases.

It sufficiently appears from the bill that the question of the right of possession as to the ground in conflict was presented to the court for decision and that the decision of the court was in favor of the defendant. As the judgment must necessarily go against both of the parties, if neither of them is entitled to the possession, the judgment in favor of the defendant declaring that the defendant had the right of possession necessarily included a decision that there was no known vein within the ground in

conflict, because the defendant's claim was based on a placer location merely, and if a vein had been known to exist within such ground, the placer location would not have given the placer locator any right to the possession of it, or of a specified area of surface ground enclosing it. As the right of possession as to the whole of the ground in conflict was given to the defendant, it was of necessity determined that there was no such known vein.

It is true that it does not appear whether the suit was an action of ejectment or a suit to quiet title; it must have been one or the other, and in either case as between the parties the question of title was involved.

In Northern Pac. Ry. Co. *vs.* Slaght, *supra*, it was said that by a judgment in favor of the plaintiff and against the defendant, in a suit to quiet title, every *possible* interest of the defendant is cut off.

We submit therefore that the question of the extent of the conclusiveness of such judgments is an open one, that the judgments are sufficiently pleaded, and that a Federal question is involved in the decision of the case, whether it be one to remove a cloud or to determine an adverse claim under the statute.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 234

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, A CORPORATION, AND ANACONDA COPPER MINING COMPANY, A CORPORATION, APPELLANTS,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, JOHANNA FARLIN, A. F. BUSHNELL, PATRICK LE ROUX, J. T. FITZGERALD, ELIZABETH BROWN, C. B. NOLAN, W. D. THORNTON, NANCY HOBBS, LOU H. HADWICK, ANNIE STALKER, M. F. CLEARY, E. J. CLEARY, ADOLPH KEPPLER, J. B. WOODS, RACHAEL MERRIMAN, BERTHA McGOWAN, AND ALICE McGOWAN, APPELLEES.

BRIEF OF APPELLEES.

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(File No. 24,900)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 617.

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, A CORPORATION, AND ANACONDA COPPER MINING COMPANY, A CORPORATION, APPELLANTS,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, JOHANNA FARLIN, A. F. BUSHNELL, PATRICK LE ROUX, J. T. FITZGERALD, ELIZABETH BROWN, C. B. NOLAN, W. D. THORNTON, NANCY HOBBS, LOU H. HADWICK, ANNIE STALKER, M. F. CLEARY, E. J. CLEARY, ADOLPH KEPPLER, J. B. WOODS, RACHAEL MERRIMAN, BERTHA McGOWAN, AND ALICE McGOWAN, APPELLEES.

BRIEF OF APPELLEES.

I. The Nature of the Law-suit.

This is an appeal from a final decree of the District Court for the District of Montana dismissing a bill for want of jurisdiction. The authority of that court was invoked on the claim that the suit presented a Federal question. The

In

averments of the bill are set forth with substantial accuracy in the brief of the appellants. The suit is what is known in the terminology of mining law as a "quartz-placer" action. The controversy arises by reason of the peculiar provisions of the law under which one is permitted to enter upon lands patented as a placer claim and to locate within such claim a lode or lodes known to exist at the time of filing the application for the placer patent. This right is exercised by virtue of the following statute:

> "Where the same person, association, or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer-claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer-claim not embracing any vein or lode-claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof."
>
> Sec. 2333, R. S. U. S.

The decisions of this court construing the statute quoted warrant the following comment by a standard writer:

> "The issuance of a placer patent containing within its limits a lode known to exist prior to the patent application, which lode is not claimed and applied

for by the placer claimant as a *lode*, does not cut off the right to appropriate it in hostility to the patentee. His failure to include it in his placer application is a conclusive declaration that he has no right to it."

Lindley on Mines, 413 (3d ed.).

Such a lode is open to appropriation as though it were discovered on the general public domain. In order to effect an appropriation, to "make a location" of such a lode, there are two requisites prescribed by the Federal statute, and only two, namely:

(1) The discovery.

(2) The marking of the location on the ground so that its boundaries can be readily traced.

Lindley, 328.

It is contemplated, however, by the congressional act that additional requirements might be imposed by the local authorities, among others the making and filing of a notice or certificate of location,

R. S. U. S., 2324,

and the validity of legislation of that character has been affirmed by this court.

Butte City Water Company *vs.* Baker, 196 U. S., 119.

From the territorial days even local statutes have been in force in Montana prescribing formalities to be observed and acts to be done in order to make a "location" of a lode claim, a record being an essential step always, but only one of a series of acts the performance of which operated to give proprietary rights to the locator. During the period important here—from 1900 to 1913, inclusive—the law of Montana underwent some unimportant changes, but in general its requirements were in conformity with those of the statutes of the other mining States. The statutes in question are thus summarized by Lindley:

"Generally speaking, under the laws of Congress as well as under State laws and local rules the natural and proper order of procedure to complete a location are: (1) discovery, (2) posting notice, (3) recording notice, (4) marking boundaries, (5) development work; but the order in which the several acts required by law are to be performed is non-essential, in the absence of intervening rights.

"The marking of the boundaries may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator."

Lindley on Mines, 330 (3d ed.).

The order prescribed by the Montana statute is as follows: (1) discovery; (2) posting notice; (3) marking boundaries; (4) development work or discovery work; (5) recording notice. For the further information of the court the statute as it appears in the Revised Codes of 1907 is set out as an appendix hereto.

The jurisdiction of the Federal court in this action is asserted upon the claim that it is a suit to remove as clouds upon the title of complainants, nine certificates of location covering portions of the land embraced within their placer patent reciting the discovery of a lode within it.

A proper comprehension of the question presented by this record cannot be secured without an accurate understanding of the nature and purpose of these certificates. An ordinary conveyance transmits the title of land from one to another. Title to public land is not transmitted by a certificate of location. It is, as has been pointed out, one of the steps by which the title passes, and not the most important one. "Discovery is the most important of all acts required in the proceedings culminating in a perfected location."

Lindley, 392.

The next step made indispensable by the Federal statute is that "the location must be distinctly marked on the ground,

so that its boundaries can be readily traced." The local law may exact more, as the posting of a notice or the doing of a definite amount of work, that the discovery may be freed from needless doubt.

> "The real purpose of the record is to operate as constructive notice of the fact of an asserted *claim* and its extent."
>
> Lindley, 392.

It thus protects the locator against the assertion of a claim by one who makes a subsequent discovery, and though essential to a perfected location, as the term is ordinarily understood, a patent will be issued to a locator though he never filed a notice, in the absence of a claim by a third party.

Section 2332, R. S. U. S.

But the discovery is the indispensably essential thing, and the claim must be marked on the ground. "A location certificate is but one step, the last one, in the location of a mining claim."

> Secretary Smith in Etling *vs.* Potter, 17 L. D., 424-426, quoted in Mining Co. *vs.* Tunnel Co., 196 U. S., 337-349.

It does not, of itself, constitute title nor the possessory right to the mining ground.

> "It must be remembered that the discovery and marking on the ground are not matters of record, but *in pais*, and if disputed in an adverse suit or otherwise must be shown, as other like facts, by parol testimony."
>
> Mining Co. *vs.* Tunnel Co., *supra*.

> "When the locator's right is challenged, he should be compelled to establish by proof outside of the certificate all the essential facts, without the existence of which the certificate possesses no potential validity. These facts once proved, the recorded certificate may

be considered as *prima facie* evidence of such other facts as are required to be stated therein, which is, of course, subject to contradiction."

Lindley, 392.

It will be noted that the Montana statute makes the certificate *"prima facie* evidence of all facts properly recited therein," but the fact of discovery is not one that it is essential the notice shall recite, and consequently that fact must be proven by evidence *aliunde*.

Flick *vs.* Gold Hill & L. M. Co., 8 Mont., 298.

"While many of the States require the date of the discovery (ordinarily of the *location*) to be stated in the recorded certificate, this would not be evidence of the *fact* of discovery."

Lindley, 392.

Moreover, the discovery must appear to have been made upon "the public domain," to use the language of the Montana statute. The certificate is not evidence that the land claimed is a part of the public domain. In the case before us the contention is made that the land claimed is a part of a tract to which the Government has passed the title to the appellants by virtue of the placer patent. The lode claimants can prevail in a contest against appellants only by showing that what appears to have been granted to them was not, in fact, because at the time of the application for the placer patent there was within the area covered by it a "known lode," which consequently remained a part of the public domain. The certificate is valueless unless supplemented by parol proof not only that a discovery was made as a foundation for the location which it recites, but also that such discovery was on a lode known to exist at the time the application for the placer patent was filed.

"The burden of proving the existence of a 'known lode' rests with the lode claimants."

Lindley, 781, p. 1914.

> "Where the lode was located subsequent to the filing of the placer application, based upon an assertion that its existence was known at the time of such filing, the party seeking to establish that it is within the exception of the placer patent must bring himself clearly within the rule enunciated by the Supreme Court of the United States, viz., that in order to meet the designation of 'known vein,' such vein or lode must have been, at the date of the placer application, clearly ascertained and known to be of such extent as to render the land more valuable on that account, and justify its exploitation; and its existence and quality must have been known to the applicant for the placer patent or known to the community generally,—from which knowledge by the applicant might be inferred,—or else disclosed by workings, and obvious to any one making a reasonable and fair inspection of the premises for the purpose of obtaining title from the Government."
>
> Lindley, 781, p. 1913.

So much has been said in advance in order to exhibit to such of the members of the court as may not be familiar with the intricacies of a quartz-placer controversy the supreme importance, in suits involving such, of proof of facts which must be made by the testimony of witnesses and the relative unimportance of the certificate of location.

It is to annul and cancel a number of such certificates, as heretofore stated, upon the ground that there was no known lode within the area covered by the appellants' patent at the time the application for it was filed, that this suit is brought.

II. What Are the Necessary Averments of a Bill Seeking the Relief Asked?

It is asserted that the action is one to clear clouds upon title, presenting a Federal question.

The rule is recognized by the appellants that in order to invoke the Federal jurisdiction it must appear from the bill

that the construction of an act of Congress is involved, and likewise that in the statement of the case on the part of the complainants it is not permissible to anticipate what claim may be made by way of defense for the purpose of bringing into the case a Federal question or showing that the determination of the controversy depends upon such.

It is claimed, however, that the present suit does not fall under the ban of this well-established rule, because of its peculiar character—an action not to quiet title, but to clear cloud from title, in which it is permissible for, and even required of the complainant that he set out: (1) his own title; (2) the instrument constituting the cloud, and (3) the facts which show the invalidity of or want of force in such instrument.

This the appellants say is what they have done and all they have done.

It is admitted that in an action in ejectment the plaintiff is required only to allege in general terms his title and the ouster. He may not, for the purpose of invoking the Federal jurisdiction, plead that the defendant claims to be entitled to the premises by reason of certain facts, in consequence of which, should they appear, the rights of the parties will depend upon the construction which should be given to an act of Congress.

Taylor *vs.* Anderson, 234 U. S., 74.

It seems likewise to be admitted that in an ordinary action to quiet title, the complainant being required only to set out his own title and that the defendant claims some right adverse to him, he may not supplement such averments with others in which are detailed the facts claimed by such party to give him the right which he professes to have, and that a Federal question so appearing does not confer jurisdiction upon a national court. But it is insisted that an action to clear cloud from title is essentially different in character and warrants averments concerning the claims made by the

defendant pursuant to which the instrument to procure the annulment of which is the purpose for which the suit is brought is filed.

Devine *vs.* Los Angeles, 202 U. S., 313.

Montana has long had one of the modern statutes authorizing suits to quiet title. It is as follows:

> "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."
>
> Section 6870, Revised Codes of Montana, 1907.

The adjudications are uniform that under statutes in substance like that quoted—and in the Federal court in which it may be invoked as well as in the State court—it is enough to aver in general terms the title of the plaintiff and in equally general language that the defendant asserts some title adverse to him.

See cases cited in Devine *vs.* Los Angeles, *supra.*
Merk *vs.* Bowery Mining Co., 31 Mont., 298-309.
Pollock *vs.* Davenport, 31 Mont., 452.
Ely *vs.* New Mexico, etc., R. Co., 129 U. S., 291.

Such a pleading warrants a decree quieting the title of the plaintiff against any claims of the defendant of any nature whatever, enjoining and restraining him from asserting any claim whatever to the premises and adjudging as null any and all instruments purporting to show title in him.

15 Ency. of Forms, 205.

The bill in this case contains all the averments requisite in a complaint in an action under the Montana statute. It avers ownership of the premises in controversy in the complainants; it sets up the claims asserted by the defendants adverse to the complainants, and asserts "that said defendants have not and none of them has any right, title, or inter-

est, either at law or in equity, in or to the said land or any part thereof." It prays not only for general relief—that is, any relief appropriate to the case made by the bill which would justify a decree in scope as above indicated—but asks further that "the title of the complainants herein be quieted," not as against the specific claims referred to in the bill, but *quieted*—that is, quieted against any claims that might be asserted by the defendants. They ask specific relief, it is true, touching the certificates of location, namely, "that the cloud caused by the recording of the said declaratory statements of location and certificates of location in the office of the county clerk and recorder of Silver Bow County, Montana, and each and all of them be removed and the same decreed to be no cloud upon the title of the complainants." But how is the court to proceed to "remove" these certificates from the record, and, as for adjudging that they are no cloud, how does a recital to that effect in the decree add to the force of a sweeping adjudication that the defendants have no right, title, or interest in the premises?

The suit is to all intents and purposes one, or the equivalent of one, brought under the statute with some superfluous allegations setting out in detail the nature of the claims asserted by the appellees, with a recital of conditions by reason of which the appellants assert the appellees have no title.

If this is not the true view to take of the pleading, it is true that the complainants might have contented themselves with making a general averment of title, such as appears in the bill, referring, if they cared to do so, to the patent as its source, and a like general averment of the assertion of an adverse claim by the defendants and praying generally that title be quieted in complainants; that defendants be adjudged to have no interest; that they be enjoined from asserting *any* claim, and that any and all instruments of record or otherwise purporting to show title in them be adjudged null. Such a bill would call for an answer, in which each defend-

ant would be required to set up the facts claimed by him to entitle him to "locate," namely, the existence of a "known vein" within the placer patent, and the various steps by which he appropriated the same, discovery, marking boundary, posting, development work, and recording notice. The complainants' replication would put all these facts in issue and, prevailing upon the final hearing, they would have a decree such as is above suggested with a specific reference, if desired (which, however, would add nothing to either its efficacy or its scope) to the notices of location, the filing of which was the culminating act in the case of each defendant in his effort to acquire title.

It may be conceded, as is contended by appellants, that in an action to remove cloud from title, independent of the statute, the complainant is required to set out his own title, the particular instrument which he seeks to have "removed," and the facts in consequence of which the document which apparently invests the defendant with title does not have that effect. It is perhaps equally true that a bill of complaint to remove cloud from title, good as against a demurrer prior to the statute, is still equally invulnerable. All this is beside the question, which is whether a suitor may, in order to invoke the Federal jurisdiction, elect to draft his pleading in a more detailed way than he is required to, narrowing the relief to which he is entitled to a decree against a specific claim or specific claims, and one or more specific instruments evidencing the same, instead of a judgment quieting his title against any and all claims of whatever nature that may be asserted by the defendants.

It is obvious that whichever form is pursued in the drafting of the initial pleading, the lawsuit will run the same course. In either case the contested issue will be whether there was within the area patented as a placer claim a "known lode" at the time the application for patent was filed.

This court has repeatedly said that in order to call the

national court into action the Federal question must *"necessarily"* appear from the "plaintiff's statement of *his own claim* in the bill."

Taylor *vs.* Anderson, 234 U. S., 74.
Denver *vs.* N. Y. Trust Co., 229 U. S., 123-133.
Third Street & S. Ry. Co. *vs.* Lewis, 173 U. S., 457.

Even if it be admitted that it is *permissible* in the complainants to make the specific averments found in the bill, they are under no *necessity* to do so in order to get the full relief to which they are entitled.

The appellants assume that there is no kinship between the statute and a suit to remove cloud from title. They associate it alone with the equity jurisdiction to quiet title and argue that the remedy always administered by courts of equity, the removal of cloud from title, remains unimpaired, and they insist, with much vigor, that State statutes cannot abridge the equity powers of the Federal court. The statute does not abridge, but enlarges, the equity powers of the Federal court in the matter of clouds upon title, not by augmenting their jurisdiction, but by creating new rights or, rather, by extending existing rights. It is quite commonly understood that the statute gives the right to maintain suits to quiet title under conditions which, under the practice of equity courts prior to the statute, would not lie. The suit to quiet title, as it was developed by the court of chancery, was prosecuted to arrest repeated vexatious trials in actions of ejectment. It was maintainable, likewise, in another class of cases, unimportant for the purpose of this discussion, "for the purpose of establishing a general right between a single party and numerous persons claiming distinct and individual interests."

Boston & M. Co. *vs.* Montana Ore Pur. Co., 188 U. S., 632-641.

In the class of cases first mentioned it was necessary that the complainant aver that his title had been established by

at least one successful trial at law before equity would entertain jurisdiction.

Id.

The statute, however, gave to the party in possession—every party, whether he had or had not established his right in an action at law—the right to call his adversary into a court of equity to obtain an adjudication of the controversy as to the title, which should forever determine it, and to secure, as appropriate relief, an injunction against the defendant forbidding the further assertion of title on his part.

Now, while it may be that a suitor is entitled to plead, as of old, that his title has been successfully defended or asserted in an action at law, he is not required to make any such allegation, and indisputably he could not, by doing so, invoke the jurisdiction of a Federal court.

And so with the action to remove cloud from title. Embarrassments of a most serious character were suffered by parties whose titles were affected by adverse rights. Equity would not take jurisdiction to remove as a cloud upon title an instrument the invalidity of which appeared upon its face, if it was invalid at all, the rival claims of the parties depending possibly upon the most obscure questions of law. Pomeroy's assault upon this limitation upon the right of the court to remove cloud from title is well known.

4 Pomeroy, 1399 (3d ed.).

It was so persuasive in character that some courts refused to recognize the ancient rule, and even in the absence of a statute ventured to "remove" from the record instruments void on their face because of the embarrassments they occasioned to the owner in any attempt he might make to sell.

Under such statutes as that of Montana quoted above it is immaterial whether the invalidity of the instrument appears upon its face or must be shown by evidence *aliunde;* the court can render judgment declaring it null and enjoining

the assertion of title under it. It was one of the purposes of the statute to meet the condition adverted to. It enlarged the cases in which a court of equity could award a decree clearing cloud from title as well as the cases in which equity would quiet title. Such was the significance given to an early statute of the character of those being considered of the State of Kentucky in

Clark *vs.* Smith, 13 Pet., 195.

The language of the court to which reference is made is quoted in the opinion in

Holland *vs.* Challen, 110 U. S., 15-22, 23.

In

Fox *vs.* Williams, 92 Wis., 320,

the court recognized the rule that equity would not cancel as a cloud upon title an instrument void on its face, but it at the same time declared that the statute had changed this and it adjudged accordingly, the court expressing itself to the effect that the statute extends to an instrument not even apparently a cloud upon the title, but which is capable of being used to affect the title injuriously. Similar comment touching the character of actions warranted by the statute is made in

Head *vs.* Fordyce, 17 Cal., 149.
Maxon *vs.* Ayres, 28 Wis., 612, and
Dean *vs.* Madison, 9 Wis., 402.

A deed void on its face was made the basis of the action in

Reynolds *vs.* Crawfordsville, 112 U. S., 405,

in which the statute was treated as enlarging the remedy of removing a cloud, all of which justifies the following from 17 Ency. of Pl. & Pr., 290, viz:

> "The general purpose and effect of these statutes is to extend the remedy to cases in which, by the settled

> rules of equity, no relief could be had either because the adverse claim is not such as to constitute a technical cloud or because the plaintiff is not in a situation to invoke the equitable jurisdiction."

In view of the statute, it is not now necessary in a suit to quiet title to aver that the complainant's title has been settled in an action at law, since he is entitled to maintain the proceeding, whether it has or has not been. In the same way it is not necessary, in an action, the purpose of which is to clear cloud from title, to set out the character of the instrument in order that the court may see whether on its face it purports to give title or that it is *prima facie* valid. Equity will "remove" it, whether it is valid on its face or not.

It is not even necessary that it should appear that the claim which the defendant makes is founded on a written instrument. Having in mind only the old procedure, it was quite proper to say:

> "A bill will not lie to remove a mere verbal claim or oral assertion of ownership in property as a cloud upon the title."
>
> 6 Ency. of Am. & Eng. Law, 151.
> Devine *vs.* Los Angeles, 202 U. S., 334-5.

But under the new dispensation any claim—a claim of right arising by adverse possession or by a lost instrument—will evoke the equity powers of the court.

The right has been so enlarged and extended by the statute that it is no longer necessary to descend into detail in the pleading in order that the court may know that the claim on the validity of which it is to pass, is a certain particular kind of claim.

The pleading need not be so specific, because the limitations on the right have been removed. If a statute makes the sale of intoxicating liquors under certain conditions, at certain places and in certain quantities, criminal, an indictment must charge that the sale was made under the condi-

tions laid down in the act, at a place such as is therein specified, and in the quantity which it forbids. If the statute is amended so as to make it penal to sell such at all, it will suffice to aver simply that the defendant sold at some place within the jurisdiction of the court.

The suit to quiet title and the suit to remove cloud from title were always so closely related in character that they are almost invariably treated of together, usually under a common title, by the commentators. By the operation of the statute they have all but coalesced. As expressed by the learned district judge: "Under modern statutory enactments the distinction has little more than an historical interest."

To repeat: It may have been *permissible* in the appellants to plead in detail as they did; it was not *necessary* for them to do so. It was, accordingly, held in a case very like this that the Federal jurisdiction could not be invoked by superfluous averments.

California O. & G. Co. *vs.* Miller, 96 Fed., 12.

III. Is a Federal Question Raised Aside from the Propriety of the Pleading?

(*a*) *Title Not Made by the Certificate.*

But if it be admitted that a Federal question may be raised by electing to plead, as required by the old system, by denying one's self the more comprehensive relief which the statute affords, and asking only an adjudication on the validity of the particular instrument attacked, is a case made which calls into action the national court?

As pointed out heretofore, the real controversy between the parties is not over the validity of an instrument by which title is conveyed. The meat of the matter is whether there was a "known lode" within the patented area at the time the application was filed in the land office. If that essential and basic fact is established, then the inquiry proceeds to ascer-

tain whether the various steps constituting a "location" were followed, including the filing of the notice or certificate attacked. That instrument is not a conveyance by which title passes, apparently, as in the case of a forged deed, a tax deed, a deed executed under a power of attorney after the death of the donor of the power, a deed recorded but never delivered, a sheriff's deed issued upon a sale under a judgment satisfied but not discharged of record. In all these cases title would be made by the introduction of the deed, which under modern statutes, if recorded, would prove itself. A claimant under one of the certificates attacked here would have made practically no progress at all in an action of ejectment by the introduction of his certificate of location. Its authenticity would, doubtless, pass unquestioned. The real struggle would not yet have begun. Indeed, in the logical order, the certificate ought not to be admitted until by extraneous evidence the fact of the existence of the known lode and the discovery are shown, and when they are shown the right of the plaintiff rests primarily upon them and not upon the location certificate. In order to recover, the lode claimant *must* introduce parol evidence, either before or after the admission of the certificate. So in an action brought by the placer patentee under the statute to establish his title, he may introduce his patent and rest. As shown above, the burden is on the lode claimant to establish the existence of a known lode. The certificate is utterly useless to him until proof is made of that fact and of his discovery, at least. An interesting inquiry is here suggested. A plain, simple route is open to a placer patentee to try the validity of a certificate of location by availing himself of the rights flowing from the statute. If he may elect not to do so, but has the right to frame his pleading more elaborately, as was requisite before the statute, must he take upon himself a like burden as to the proof? Must he *prove* the *averment* of the bill, that there was no known lode within the patented area at the time the application was filed, or may he content himself with the

case made when his patent is introduced, as he could in an action founded on the statute? Will not the case proceed in exactly the same way? Will not the questions at issue be identical? Will not the burden of proof be upon the same party, whether the pleading is framed in conformity with the statute or professedly in accordance with the ancient practice? This is a diversion more appropriate to the aspect of the case now passed, as to whether the complainants gain any rights by ignoring, if they do ignore, the statute.

The lode claimants, should they sue at law, could not recover on their certificates alone; neither could they successfully defend. They must introduce evidence. If the bill of complaint is truthful, they must fail because there was no known lode. The appellants insist that for the purposes of the case the statute must be disregarded. They are proceeding, they say, under the equity practice, regardless of statutory enactments. If so, they must make a case under that practice. One of the rules governing suits to remove cloud upon title is that if the party claiming under the instrument asserted to be a cloud would be obliged, in an attempt to make out his case, in an action brought by him to secure possession, to submit evidence which would show the instrument to be invalid or ineffective, it will not be canceled as a cloud. In such an action it would appear either that there was or that there was not a known lode. If it would be developed that there was not, equity will not remove the cloud for the reason stated. If it would appear that there was such a lode, equity certainly, in an action by the placer patentee, would not annihilate the location notice. But the rule goes farther than as indicated above. It is more accurately stated in the following excerpt:

> "Equity will not interfere to remove a cloud on title where the invalidity of the instrument or claim complained of appears on its face; *where extrinsic facts must be proved for the purpose of establishing its validity;* or where the party claiming under it must,

> in order to recover thereon, necessarily offer evidence inevitably showing its invalidity and destroying its effect."
>
> 32 Cyc., 1315.

Note that the second condition expressed in the rule as announced above is that when the claimant is obliged to go beyond the instrument in question and make proof of facts, aside from those bearing on its authenticity, to establish conditions in the light of which alone, in conjunction with the instrument, title can be asserted, equity will not interfere. The language is that of the Court of Appeals in

Lehman *vs.* Roberts, 86 N. Y., 232-239.

A tax deed, given character by a statute making it *prima facie* evidence of the regularity of all prior proceedings, constitutes a cloud on title. But equity will not interfere when in the absence of such a statute the claimant is obliged to show not only the deed but the strict observance of all antecedent proceedings.

The same idea was expressed by the court last above referred to in

Scott *vs.* Onderdonk, 14 N. Y., 9-14,

in the opinion in which, after stating that equity would not entertain a suit to cancel a deed void on its face, added:

> "The same reason applies to cases where the claim requires the existence of a series of facts or the performance of a succession of legal acts, and there is a defect as to one or more of the links. The party must, in general, wait until the pretended title is asserted. This principle is very well settled by authority (citing cases). In both classes of cases the party whose estate is questioned may naturally wish to have the matter speedily determined, as he may, in the meantime, suffer inconveniences and even damage on account of the discredit attaching to his title by reason of the unfounded claim. But unless the circumstances are such as to sustain an action for slander

of title, the law regards the injury as too speculative to warrant its interference."

> "It has been held in some cases (says Cooley) that if the purchaser at a tax sale must take upon himself the burden of showing the regularity of the proceedings so that the deed itself is not *prima facie* evidence of title, the owner of the record title was sufficiently protected in this rule of law, and a bill in equity would not lie on his behalf to remove the lien of the tax, or set aside the deed after a sale."
>
> 2 Cooley on Taxation, 1451-2 (3d ed.).

If the averments of the bill of complaint be true the lode claimant must inevitably fail in an effort to make title in an action at law. If they be untrue, and the placer patentee did not get title to all the land included in his patent because there was within it a known lode, which his adversary located, there ought to be no decree giving complainants title to the whole, as they ask.

(*b*) *As to Excess Width, the Alleged Defect Appears on the Face of the Certificates.*

But the difficulties do not cease here. Whether there was a known lode or not is a pure question of fact. So far as that feature of the case is concerned, no Federal question is presented. The appellants' counsel are too learned in the law to assert that there is, though the rights of the appellees rest upon the placer-patent statute quoted.

> "3. A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under these laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central

> and western States would so arise, as all titles in those States are traceable back to those laws."
> Shulthis *vs.* McDougal, 225 U. S., 561-569.

To make a case which "involves a dispute or controversy respecting the validity, construction or effect of such a law" it is advanced that the appellees claim that a location may be made of a known lode within a placer patent 1,500 feet in length by 600 feet in width, and that the pretended locations were made in extent to conform to such idea, while under the true construction of the statute they could not have a width greater than 25 feet on each side of the center of the vein. But whatever difference of opinion may exist, either in the courts or before the Department, upon this interesting question, such infirmity as there may be in the certificates in question, because the claims were located 600 feet in width instead of 50, appears upon the face of the instruments. And under perfectly well-established rules equity will not interfere in such a case.

(c) *Partial Invalidity of Certificates Will Not Warrant Relief Appropriate to Suit to Clear Cloud.*

Perhaps it is not claimed that the certificates are void *in toto* because the claim was marked on the ground too wide, but only that it is void or ineffective as to the excess. This was apparently the view of the district court in the case referred to in appellants' brief,

> South Butte M'n'g Co. *vs.* B. & V. M. Co. (not reported),

and it is in conformity with the decisions of the courts generally touching locations excessive in area, at least when they are made in good faith.

2 Lindley, 362.

But whatever be the claim, the alleged defect or irregularity is apparent on the face of the certificates.

Cancellation is the appropriate remedy in an action to clear cloud from title.

Hicks *vs.* Rupp, 140 Pac., 97 (Mont.).

The court cannot partially cancel a conveyance, nor can it partially remove the certificates in question from the record. It is a settled principle that a suit cannot be maintained to remove as a cloud from title an instrument valid in part and void in part.

Latham *vs.* Inman, 88 Ga., 505.

Prospect Park *vs.* Morey, 140 N. Y. Supp., 380.

The complainants might maintain an action under the statute to quiet their title to all the ground embraced in the location beyond the limit of twenty-five feet from the center of the vein and to so much of it as, in length, is not supported by an exposed vein. But a bill to remove the certificate from the record or to obtain the cancellation of the original, obviously cannot be sustained.

(*d*) *Alleged Estoppel Raising Federal Question.*

The facts relied upon as an estoppel are, however, it is insisted, properly pleaded, and out of them a Federal question is said to arise. As the question presented by this aspect of the case has been decided adversely to the contention of appellants by this court, it is unnecessary to dwell upon the merit of the pleading as such. The bill avers that the placer claimants having filed their application for patent, adverse claims were interposed by parties claiming to be the owners of two lode claims within the area for which the placer patent was asked, the Point Pleasant and the Pleasant View; that pursuant to the statute they instituted actions to establish their right to the ground in controversy, which

eventuated in favor of the placer claimants, to whom patent was awarded in due course upon the filing in the Land Office of the appropriate proof of the result of such actions. No privity exists between the plaintiff in either of those actions and the appellees here, except it be because of the construction which the appellants ask shall be given to the statute authorizing the institution of suits to try the rival claims respecting the right of possession to mining ground when application for patent to the same is made.

Sec. 2326, R. S. U. S.

It is advanced, however, that, though not named as such, the United States is in effect a party to any suit brought under that section; that the judgment determined that the land—and all of it—was placer in character and that there was not within it any lode; that, whether such conclusion was sound or unsound, the Government is precluded from asserting the contrary, and that the appellees, claiming title under the United States by virtue of an appropriation made later, are equally estopped to assert that there was within the area patented as placer, a "known lode." The judgment must be given this effect, it is claimed, because of language in the act (sec. 2326, *supra*) said to be open to the construction which the appellants ask be given it.

If the proposition were a debatable one a Federal question might be presented; but it isn't. It was decided adversely to the contention of the appellants in

Clipper M. Co. *vs.* Eli M. & L. Co., 194 U. S., 220-232, 233.

It is in that case held that the adverse action determines nothing as against the United States except as to which of the parties, as between each other, is entitled to the ground. The Government is in no sense concluded by the lawsuit as to the character of the land or any part of it. The land officers are still required to satisfy themselves that the ground

is of the character contemplated in the law under which the claimant seeks to acquire it, and that he is otherwise entitled to the patent. The relation of the Government to the land is exactly what it would have been had there never been an adverse claim filed or a suit brought to effectuate it.

This court considered the statute in question in

Perego *vs.* Dodge, 163 U. S., 160-168,

in the opinion in which it is said:

> "It must be remembered that it is 'the question of the right of possession' which is to be determined by the courts, and that *the United States is not a party to the proceedings.* The only jurisdiction which the courts have is of a controversy between individual claimants, and *it has not been provided that the rights of an applicant for public lands as against the Government* may be determined by the courts in a suit against the latter. United States *vs.* Jones, 131 U. S., 1; Last Chance Mining Company *vs.* Tyler Mining Company, 157 U. S., 683, 694."

And then the court added:

> "It was held by Mr. Justice Lamar, when Secretary of the Interior, that, notwithstanding the judgment of a court on the question as to the right of possession between two litigants, it still remained for the Land Department to pass on the sufficiency of the proofs, and to ascertain the character of the land and whether the conditions of the law had been complied with in good faith before the Government parted with the title. 4 Land Dec., 314, 316."

The decision by this court in the case first above referred to on this feature was anticipated by the Supreme Court of Montana in

Butte L. & I. Co. *vs.* Merriman, 32 Mont., 402-413,

in which the contention was advanced with respect to these very same lode locations, the Point Pleasant and the Pleasant

View. In the course of its opinion the court, referring to the adverse suits, designated as causes 3620 and 3621, said:

> "Under the pleadings in causes 3620 and 3621 it may be conceded, for the purpose of this decision, that, as between the parties to those actions and their privies, there was an adjudication of that fact. It is also a conceded fact that defendants Merriman and Mason were not parties to either of those actions, and are not claiming under any one who was designated as such. But on behalf of respondents here it is contended that, though not nominally a party, yet, as a matter of fact, the United States Government was actually a party, and as such was bound by the judgment in each of those actions, and, as the only claim of defendants Merriman and Mason is founded upon rights acquired from the Government by virtue of their lode locations, therefore they are in privity with the Government, and likewise bound to the same extent as though actually parties by name."

Concerning the proposition so stated the court continued:

> "But in what sense was the Government a party to either of those suits in the district court? It was not a party plaintiff asserting any right, and it has never consented to be made a defendant and to be sued in the State courts; neither did it intervene to have any supposed right of its own adjudicated. But it is contended that the Government is bound by the judgment in an adverse suit, and Last Chance M. Co. *vs.* Tyler M. Co., 157 U. S., 694; 15 Sup. Ct., 737; 39 L. Ed., 859, is cited in support of this contention. In the course of the opinion in that case it is said: 'An applicant for public lands cannot have his right thereto as against the Government determined by the courts in a suit against the latter. (United States *vs.* Jones, 131 U. S., 1; 9 Sup. Ct., 669; 33 L. Ed., 90.)'"

And then, having considered the statute, its conclusion was announced as follows:

> "To say that, in an adverse suit by A against B, either party can have his claim to a particular piece

of mining ground litigated as against the Government, is to say that one may do by indirection that which he cannot do directly, for it is settled beyond controversy that one may not have his right to public land, as against the Government, determined by the courts in an action against the Government." * * *

"These considerations seem sufficient in determining that the Government is not a party to an adverse suit; and as these defendants, Merriman and Mason, were not parties to either suit (3620 and 3621), and are not in privity with any one who was, it follows, as a matter of course, that they are not concluded by the judgments rendered in those actions."

Lindley tersely states the law in this language:

> "The Government is not a party to the suit and is not bound to issue a patent to a successful litigant. The judgment simply determines the 'right of possession' and not the right to a patent."
>
> 3 Lindley, 765 (p. 1869).

It is unnecessary to refer to the authorities holding that a "Federal question" ceases to be such when it has been decided by this court.

The learned counsel for the appellants sought, in an action presenting another phase of the litigation of which the present suit is a part, to secure approbation for his views on the specific question under consideration from the Circuit Court of Appeals for the Ninth Circuit, but that court declined, saying:

> "It" (the judgment on the adverse suit) "had not the effect to determine that there were not within the ground covered by the placer claim, veins or lodes known to exist at the time of the application for the patent, and it has no bearing upon subsequent locations, the rights whereof depend on the question whether, at the time the placer patent was applied for, there were known veins and lodes such as to be excluded from the grant of the patent."
>
> Mason *vs.* Washington Butte M. Co., 214 Fed., 32.

The views of the courts referred to on this point might not be of much consequence were it not for the fact that they treat the question as one past argument because of the direct ruling of this court.

Judgment in favor of the placer claimants in the adverse suits did not necessarily determine that there was no lode within the area patented, even as between the immediate parties to those proceedings. The plaintiffs therein may have been defeated because of a technical defect in their complaints, because, though a discovery was made, the location was not completed by marking the boundaries as required by the statute, or because no location notice was filed or was filed too late, or because it was fatally defective. Many of these suits have failed because the location certificate did not meet the requirements of the law. It may be that it appeared that a perfect location was made, but that it was abandoned or forfeited for failure to perform the annual labor required by the statute.

The bill in this case does not advise the court that the question of the existence of a lode within the placer was actually determined in either adverse suit.

So far as the right of the lode claimants to the Point Pleasant or Pleasant View lodes is concerned, it is immaterial upon what ground the judgment went. Every question which might have been litigated is concluded against them so far as those particular claims are concerned. But when the judgment is offered in evidence in another suit, based upon another claim as conclusive upon any of the questions at issue in the latter, it is evidence only upon the matters actually litigated and determined.

The decisions of this court permit no further discussion of that subject.

Dennison *vs.* U. S., 168 U. S., 241-249.

It received elaborate consideration from the court in Cromwell *vs.* County of Sac, 94 U. S., 351.

There is no longer any dissent from the rule expressed thus by a standard writer:

> "Where a second action between the same parties is upon a claim or demand different from that involved in the first action, the judgment in such first action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered; it is not conclusive as to other matters which might have been, but were not litigated."
>
> 2 Black on Judgments, 609 (page 926).

The appellants encounter a whole line of decisions by this court before they can present the question as to whether the Government was an adversary party in the suits antecedent to patent.

The suit was properly dismissed.

Respectfully submitted,

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APPENDIX.

SEC. 2283. LOCATION OF MINING CLAIMS—DISCOVERY NOTICE, MARKING BOUNDARIES.—Any person who discovers upon the public domain of the United States, within the State of Montana, a vein, lode or ledge of rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, or a placer deposit of gold, or other deposit of minerals having a commercial value which is subject to entry and patent under the mining laws of the United States, may, if qualified by the laws of the United States, locate a mining claim upon such vein, lode, ledge, or deposit, in the following manner, viz:

1. He shall post, conspicuously, at the point of discovery a written or printed notice of location, containing the name of the claim, the name of the locator, (or locators, if there be more than one,) the date of the location, which shall be the date of posting such notice, and the approximate dimension of area of the claim intended to be appropriated.

2. Within thirty days after posting the notice of location he shall distinctly mark the location of the ground so that its boundaries can be readily traced. It shall be *prima facie* evidence that the location is properly marked if the boundaries are defined by a monument at each corner or angle of the claim, consisting of any one of the following kinds: (1) A tree at least eight inches in diameter and blazed on four sides. (2) A post at least four inches square by four feet six inches in length, set one foot in the ground, unless solid rock should occur at a less depth, in which case the post should be set upon such rock, and surrounded in all cases by a mound of earth or stone at least four feet in diameter by two feet in height. A squared stump of the requisite size, surrounded by such mound, shall be deemed the equivalent of a post and mound. (3) A stone at least six inches square by eighteen inches in length, set two-thirds of its

length in the ground, with a mound of earth or stone alongside at least four feet in diameter by two feet in height, or (4) a boulder at least three feet above the natural surface of the ground on the upper side. Where other monuments or monuments of lesser dimensions than those above described are used, it shall be a question for the jury, or for the court where the action is tried without a jury, as to whether the location has been marked upon the ground so that its boundaries can be readily traced. Whatever monument is used, it must be marked with the name of the claim and the designation of the corner either by number or cardinal point.

3. Within sixty days after posting such notice he shall sink a shaft upon the vein, lode or deposit at or near the point of discovery, to be known as the discovery shaft. Such shaft shall be sunk to the depth of at least ten feet vertically below the lowest part of the rim of such shaft at the surface or deeper if necessary to disclose the vein or deposit located, and the cubical contents of such shaft shall not be less than one hundred and fifty cubic feet: *Provided*, That any cut or tunnel which shall disclose the vein, lode or deposit located at a vertical depth of at least ten feet below the natural surface of the ground and which constitutes at least one hundred and fifty cubic feet of excavation, shall be deemed the equivalent of such shaft: *And provided also*, That, where the vein, lode or deposit located is disclosed at a less vertical depth than ten feet, any deficiency in the depth of the discovery shaft, cut or tunnel may be compensated for by any horizontal extension of such working, or by any excavation done elsewhere upon the claim, equaling, in cubical contents, the cubical extent of such deficiency; but in every case at least seventy-five cubic feet of excavation shall be made at the point of discovery.

SEC. 2284. RECORD OF CERTIFICATE OF LOCATION.—Within sixty days after posting the notice of location and for the purpose of constituting constructive notice of the

location, the locator shall record his location in the office of the county clerk of the county in which such mining claim is situated. Such record shall consist of a certificate of location containing:

(1) The name of the lode or claim.

(2) The name of the locator or locators, if there be more than one.

(3) The date of location and such description of said claim, with reference to some natural object or permanent monument, as will identify the claim.

(4) In the case of a lode claim, the direction and distance claimed along the course of the vein each way from the discovery shaft, cut or tunnel, with the width claimed on each side of the center of the vein.

(5) In the case of a placer claim, the dimensions or area of the claim, and the location thereon on the discovery shaft, cut or tunnel.

(6) The locator and claimant, at his option, may also set forth, in such certificate of location, a description of the discovery work, the corner monuments and the markings thereon, and any other facts showing a compliance with the provisions of this law. Such certificate of location must be verified, before some officer authorized to administer oaths, by the locator, or one of the locators, if there be more than one, or by authorized agent. In the case of a corporation, the verification may be made by an officer thereof or by an authorized agent. When the verification is made by an agent, the fact of the agency shall be stated in the affidavit. A certificate of location so verified, or a certified copy thereof, is *prima facie* evidence of all facts properly recited therein.

Revised Codes of Montana (1907), secs. 2283 and 2284.

HOPKINS ET AL. *v.* WALKER ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

No. 234. Submitted October 18, 1915.—Decided June 11, 1917.

A case arises under the laws of the United States where an appropriate statement of the plaintiff's cause of action, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a controversy respecting the validity, construction or effect of a law of Congress.

A substantial controversy respecting the construction and effect of the mining laws is presented by a case in which the plaintiff sets up title under a placer patent, alleging that the *locus in quo* was not known to contain lodes when the patent was applied for and was so adjudged against strangers to the suit who adversed the application, and in which the defendants, notwithstanding such judgments, claim the same ground under other lode locations made after the patent and embracing claims of the width of 600 feet, while plaintiff contends 25 feet would be the maximum if the ground remained subject to lode location.

In a suit to remove a particular cloud from the plaintiff's title, the facts showing that title and the existence and invalidity of the instrument or record sought to be eliminated as a cloud are essential parts of the plaintiff's cause of action and must be alleged in the bill.

The rule is the same in respect of suits to remove clouds under § 6115 of the Montana Codes of 1907, as distinguished from suits to quiet title under § 6870.

Recorded certificates of location are the first muniment of the locator's paper title and, when verified, are, in Montana, made *prima facie* evidence of all facts properly recited in them (Codes 1907, §§ 2284, 2285); and so, when apparently valid but actually, under the mining laws, invalid, they may becloud the title injuriously.

Reversed.

THE case is stated in the opinion.

Mr. L. O. Evans, *Mr. W. B. Rodgers*, *Mr. D. Gay Stivers*,

Mr. D. M. Kelly, Mr. J. L. Templeman, Mr. John A. Shelton and *Mr. H. C. Hopkins* for appellants.

Mr. Thomas J. Walsh for appellees.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a direct appeal under § 238, Jud. Code, from a decree dismissing a suit in equity for want of jurisdiction, the question for decision now being whether the case presented by the bill is one arising under the laws of the United States.

With considerable detail the bill alleges that the plaintiffs are the owners of a placer mining claim in Montana for which a United States patent was issued to their predecessors in interest in 1895; that they and their predecessors have been the owners and in actual possession for more than twenty years; that at the time of the application for the patent no mineral-bearing vein or lode was known to exist within the boundaries of this placer claim; that prior to its location two lode locations were made or attempted to be made covering part of it, and while the application for the patent was pending the lode claimants conformed to the mining laws of the United States by filing adverse claims in the local land office and bringing suits to establish them in a court of competent jurisdiction; that the placer claimants prevailed in those suits and certified copies of the judgments were duly filed in the local land office; that further proceedings were then had in the Land Department resulting in the issue of a patent to the placer claimants according to those judgments; and that under the mining laws this passed to the plaintiffs' predecessors a full title to all land and all minerals within the boundaries of the placer claim.

The bill further alleges that notwithstanding the

absence of any known vein or lode within the boundaries of the placer claim at the time of the application for the patent, notwithstanding the judgments in favor of the placer claimants in the two adverse suits and notwithstanding the issue of the patent, several persons claim to have made lode locations at different times from 1900 to 1913 upon part of the placer claim—the part covered by the two earlier lode locations which were unsuccessfully asserted in the adverse suits—and have caused certificates of the location of these later lode claims to be recorded in the office of the clerk of the county wherein the land lies; that these certificates contain declarations and recitals tending to support the lode claims to which they refer—there are nine—and give the length of each claim as 1500 feet and its width as 600 feet; that these lode claims and the certificates were made upon the mistaken theory that under the mining laws the placer patent is wholly invalid as to the ground covered by the two earlier lode claims, and, if this be not so, that the ground in controversy was known at the time of the application for the patent to contain valuable mineral-bearing veins or lodes and therefore, under the mining laws, was excepted from the patent and remained subject to location as lode claims; that, even if there were known mineral-bearing veins or lodes within the placer claim at the time of the application for the patent, no subsequent location of any such vein or lode could be made, under the mining laws, to embrace more than twenty-five feet of the surface on each side of it; that the defendants are claiming the ground in controversy under the later lode claims and the certificates before described; that for the reasons indicated these locations and certificates are invalid and the certificates, as recorded, constitute clouds upon the plaintiffs' title and reduce its market value; and that the determination of the plaintiffs' rights requires a construction of the mining laws under which the proceedings resulting in the patent were had

and a decision of what, according to those laws, passed by the patent and what, if anything, was excepted and remained open to location.

There is also an allegation that the suit is one arising under the laws of the United States and the matter in dispute exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, but there is no allegation of diverse citizenship. The prayer is that the cloud caused by the recording of the certificates of location be removed and the title of the plaintiffs quieted.

It is conceded that the plaintiffs, being in possession, have no remedy at law and that their remedy, if any, is in equity. Our concern is not with this, but with the question whether the case is one arising under the laws of the United States. A case does so arise where an appropriate statement of the plaintiff's cause of action, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction or effect of a law of Congress. *Boston &c. Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632; *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Denver* v. *New York Trust Co.*, 229 U. S. 123, 133; *Taylor* v. *Anderson*, 234 U. S. 74. Assuming that the allegations of the bill concerning the nature and validity of the plaintiffs' title and the existence, invalidity and recording of the defendants' certificates of location constitute a part of the plaintiffs' cause of action, it is plain that a controversy respecting the construction and effect of the mining laws is involved and is sufficiently real and substantial to bring the case within the jurisdiction of the District Court. This is practically conceded in the brief for the defendants which says: "The controversy arises by reason of the peculiar provisions of the law [Rev. Stats., § 2333] under which one is permitted to enter upon lands patented as a placer claim and to locate within such claim a lode or lodes known to exist at the time of filing the

application for the placer patent." But it is insisted that the allegations concerning the existence, invalidity and recording of the defendants' certificates of location form no part of the plaintiffs' cause of action and so, for present purposes, must be disregarded. To this we cannot assent.

In both form and substance the bill is one to remove a particular cloud from the plaintiffs' title, as much so as if the purpose were to have a tax deed, a lease or a mortgage adjudged invalid and cancelled. It hardly requires statement that in such cases the facts showing the plaintiff's title and the existence and invalidity of the instrument or record sought to be eliminated as a cloud upon the title are essential parts of the plaintiff's cause of action. Full recognition of this is found in the decisions of this and other courts. *Wilson Cypress Co.* v. *Del Pozo*, 236 U. S. 635, 643–644; *Lancaster* v. *Kathleen Oil Co.*, 241 U. S. 551, 554–555; *Walton* v. *Perkins*, 28 Minnesota, 413; *Wals* v. *Grosvenor*, 31 Wisconsin, 681; *Teal* v. *Collins*, 9 Oregon, 89; *Sheets* v. *Prosser*, 16 N. Dak. 180, 183.

If we turn to the statutes and decisions in Montana relating to the right to maintain such suits, we find that the same rule is recognized there. Two statutes may be noticed. Both were copied from the laws of California and are found in the Montana Codes of 1907. One, § 6115, provides for the cancellation of an instrument, apparently valid but actually invalid, where there is reason to apprehend that, if not cancelled, it may prove injurious to the plaintiff. The other, § 6870, permits a suit to quiet title against an adverse claimant in the absence of conditions which formerly were deemed essential. In California suits under the former are referred to as suits to remove clouds from title while those under the latter are called suits to quiet title. The two sections are there regarded as different in both substance and purpose—the former as putting in statutory form and preserving "an old and well settled rule of equity" and the latter as greatly

liberalizing and enlarging another old rule. Of the former, it is said that it "is aimed at a particular instrument, or piece of evidence, which is dangerous to the plaintiff's rights," and that "there can be no question but that the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, ought to be stated." *Castro* v. *Barry*, 79 California, 443; *Hibernia Society* v. *Ordway*, 38 California, 679. The Supreme Court of Montana follows the California decisions, quotes approvingly from them and holds in respect of suits to remove clouds from title that "the complaint must disclose the facts necessary to show that, but for the interposition of the court, the plaintiff may suffer injury." *Hicks* v. *Rupp*, 49 Montana, 40, 44–45; *Merk* v. *Bowery Mining Co.*, 31 Montana, 298, 309.

Thus whether we apply the general rule or the Montana rule, it is manifest that the allegations of the bill which it is insisted must be disregarded are material parts of the plaintiffs' cause of action, that is to say, they are important elements of the asserted right to have the recording of the certificates cancelled as a cloud upon the title.

Recorded certificates of location constitute the first muniment of the locator's paper title, Lindley on Mines, 3rd ed., § 379, and when verified, as in the case here, are, in Montana, made *prima facie* evidence of all facts properly recited in them. Codes 1907, §§ 2284, 2285. So, when they are apparently valid, but under the mining laws are actually invalid, as is asserted here, they may becloud the title injuriously.

We are accordingly of opinion that the bill states a case arising under the mining laws of the United States and of which the District Court is given jurisdiction.

Decree reversed.